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RECORD, CASE No. 14,149.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 180

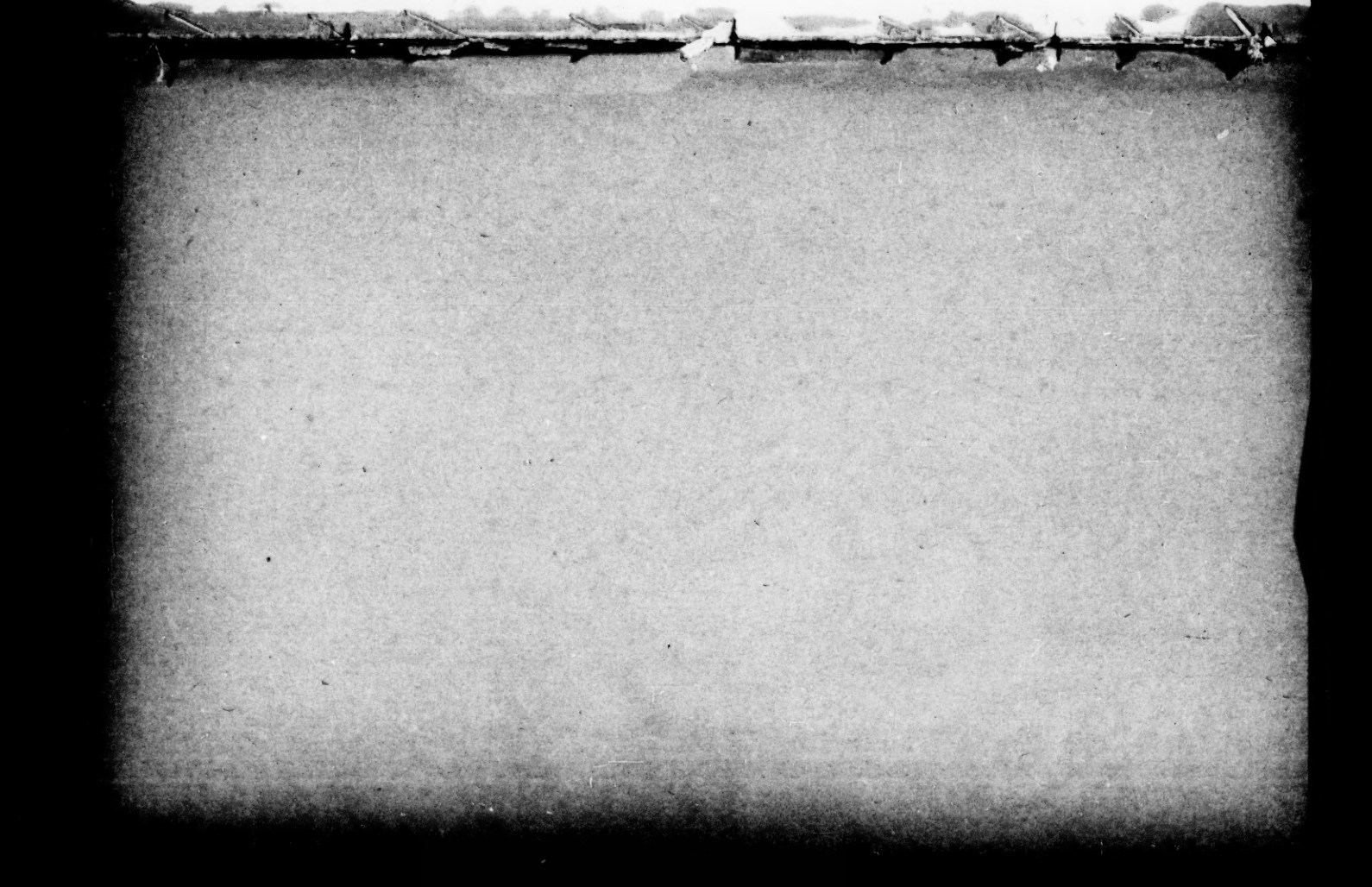
THE CRESCENT MINING COMPANY, APPELLANT,

vs.

THE WASATCH MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 16, 1890.



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a In the Supreme Court of the Territory of Utah.

WASATCH MINING CO., Respondent,
vs.
CRESCENT MINING CO., Defendant and Appellant.

Transcript.

Baskin & Van Horne and John M. Zane, attorneys for appellant; W. H. Dickson and J. G. Sutherland, attorneys for respondent.

Marked filed Jun- 3, 1890.

JOS. P. BACHE,
Clerk Supreme Court, Utah.

1 In the District Court of the Third Judicial District of Utah Territory, Salt Lake County.

THE WASATCH MINING COMPANY, Plaintiff,
vs.
THE CRESCENT MINING COMPANY, Defendant.
} Statement upon Motion for New Trial and on Appeal.

This cause came on regularly for hearing before Hon. T. J. Anderson, regularly presiding, the court sitting without a jury, on the 19th day of April, 1889, Messrs. J. G. Sutherland and W. H. Dickson appearing for plaintiff and Messrs. R. N. Baskin and Zane & Zane appearing for defendant, and the following proceedings were had:

Plaintiff read the complaint and answer in the cause and rested; whereupon the defendant read in evidence the amended complaint, the answer, the findings of fact and decree, the notice of appeal and certificate of deed deposited in the case of the Crescent Mining Company against the Wasatch Mining Company, in the third district court of Utah Territory, file number 6785, which said papers read in evidence are appended hereto and made a part hereof, marked respectively Exhibits A, B, C, D, and E: thereupon defendant read in evidence, the following order in the supreme court of Utah Territory, to wit:

2 THE CRESCENT MINING COMPANY
vs.
THE WASATCH MINING COMPANY.
} From 3rd Dist.

"This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here ordered, adjudged and decreed that the judgment of the district court therein be and it is hereby affirmed. Also that respondent have and recover of and from appellant its costs herein. Time for filing a petition for rehearing of this cause is hereby extended to include

ten days after the filing of the opinion herein, remit-itur meantime to be stayed," being found on page 392 of the Minute Book 2, records of the supreme court of Utah Territory. Defendant also read in evidence the following order, to wit:

THE CRESCENT MINING COMPANY
vs.
THE WASATCH MINING COMPANY. } From 3rd Dist.

"A petition for rehearing of this cause having been duly considered, it is ordered such a rehearing be and hereby is overruled and denied. Thereupon said appellant, by its counsel, W. H. Dickson, prayed the allowance of an appeal from the judgment of this court heretofore entered in this cause to the Supreme Court of the United States, and asked that the amount of a bond to be given on such appeal be now here fixed, on consideration whereof, it is hereby ordered that said appeal be and is hereby allowed and the amount of penal sum of a bond thereon be and is fixed at five hundred dollars." Said order being found on page 422 of the Minute Book Q, records of the supreme court of Utah Territory.

Whereupon JOSHUA R. NICHOLAS was duly sworn for defendant and testified as follows:

3 I am vice-president of the Crescent Co. and have charge of their business in this city. I had charge of it at the time of the transactions of the Crescent Mining Co. with the Wasatch Co. I am familiar with the terms of the mortgage sought to be foreclosed in this suit. Neither myself nor the Crescent Co. nor any of its agents was ever notified that an order had been made permitting the deposit of the money into court. I was never notified to appear in court or to take any steps to obtain such an order.

Cross-examined:

The Crescent Co. has a president, secretary, a board of directors and a superintendent. I know that no notice of the kind spoken of was ever served on the company, because such notices are always served on me.

W. H. DICKSON was sworn and testified for defendant: I am one of the attorneys for the Wasatch Mining Co. in this suit, and also in the suit of the company against Wm. Jennings and others, but I became attorney in the latter suit after the institution of this suit. So far as my knowledge goes, no demand was ever made on the Crescent Co. to deposit the money, mentioned in the mortgage herein into court.

J. G. SUTHERLAND was sworn and testified for defendant: I am now and was the attorney for the Wasatch Co. I had the mortgage in my hands for collection. I did not take any steps to procure an order authorizing the deposit of the mortgage money into court. I directed the company to make a demand for the payment

of the mortgage. I gave no instructions as to the form of the demand.

Thereupon it was admitted by the plaintiff as sworn to by the clerk of the third district court of Utah, that no order was ever made, or was ever asked for by either party to the suit, permitting the payment or authorizing the deposit of the money men-
4 tioned in the mortgage into court in the suit of The Wasatch Mining Co. *vs.* Jennings, *et al.*

STUART STEPHENSON was duly sworn and testified for defendant: I am superintendent of the Crescent Mining Company, and have been for nearly five years, and I have been for that length of time and I am now familiar with the property described in the mortgage. (A map was then produced showing the area and extent of the ground covered by the deed from the Wasatch Mining Co. to the Crescent Mining Co. and of the ground omitted from said deed, and the adjacent ground.) I am familiar with and have some idea of the value of the properties just named, both that omitted and that included in the deed. At the time the mortgage was made the strip left out of the deed was worth five times the amount of the part included in the deed. There was little development outside of the parcel omitted.

Cross-examined:

There have been developments made in the ground included in the deed, since the deed was made, but to what extent I cannot say. I cannot give any approximate idea of the comparative amounts of ore taken from the two areas. I cannot tell how much is standing there to-day. It is all mixed up. If the ore bodies are good, the ground would be worth a great deal more than if they pointed out.

Redirect examination:

We have deep explorations under the ground omitted. The deepest is the Ætna tunnel, 700 feet below. It has machinery in it and is worth from 60 to 70 thousand dollars. The land reached by the tunnel could not be used without passing through the omitted ground.

Recross-examination:

I cannot tell the value of the ore taken out of the ground
5 since the Crescent Co. went into possession. (Objected to by defendant as immaterial; admitted subject to objection.) I cannot say, because all the ore taken out of the mine was sold together. But I think the ore taken from the whole ground since 1886 would exceed $100,000.

J. R. NICHOLS recalled and testified for defendant: Since 1871, I have known pretty intimately the ground covered by this mortgage and the Walker and Walker extension and the Buckey claims. (These three claims are the ground purchased by the Crescent Co.

from the Wasatch Co.) I remember the date of the mortgage and the mortgage and the circumstances of its being made. All the real value there was in the ground at that time was in the part omitted from the deed. There was no opening save a single one about 100 feet deep, on any of the ground except that omitted from the deed. The tunnels in this ground are now in from lower down the hill. There was little development at the time the mortgage was given, in any of the ground included in the deed; and the part omitted was the only valuable part.

Cross-examination:

There was no machinery under this ground at the time the mortgage was given. We did not commence working on this ground until after a contract was made with the Wasatch Co. and we were not permitted to do so. There have been ore developments made in some of the ground embraced in the deed since the mortgage was made and it is very valuable ground now.

Redirect:

At the time this mortgage was given the Ætna tunnel—twenty or twenty-two hundred feet long—had been driven by us through to this ground, in order to work it.

6 Hereupon defendant rested and plaintiff offered no further evidence, and the above includes all the evidence given upon the trial of this cause.

Hereupon the cause was argued by counsel and submitted to the court for its decision thereon. Subsequently, on the 30th day of July, 1889, the court made and filed its findings of fact and conclusions of law herein, and before said findings were filed, the defendant offered the following amendments thereto:

"1st. At the end of line 26, on page 4, insert: 'That the value of the premises secondly described in the answer herein was of much greater value than that of the premises actually conveyed, being two-thirds of the whole of the premises intended to be conveyed and the acquisition of title to which was the main inducement for the purchase of said premises.'"

2nd. At end of line 26, on page 3, insert: "That the defendant since taking possession of the property aforesaid has expended large sums in improvements thereon."

3rd. At end of line 16, on page 6, insert: "That thereupon said defendant therein gave notice of an appeal and asked that the said appeal be allowed, and the same was allowed by the said supreme court to the Supreme Court of the United States, and the matter now rests and is pending upon said appeal."

4th. Strike out the 11th finding on page 6 and insert: "That the defendant is not a party to the suit of The Wasatch Mining Company *vs.* Jennings, *et al.*, mentioned above, and had no right or power to appear therein and procure any order for the deposit of money, mentioned in the mortgage, and that plaintiff has not procured any such order to be made or taken any steps in regard thereto, or no-

tified the defendant to appear in said court, at any time, to make such deposit under such order either made or to be applied for."

5th. On page 1, line 29, strike out beginning with "claim" to word "which," in line 32.

7 6th. On page 6 line 11, strike out beginning with "from" to the word "that" in line 12.

7th. In the conclusions of law, strike out on page 7, line 3, beginning with "together" to the word "court," in line 7.

8th. The third conclusion of law should contain a provision that unless the money is paid the premises should be sold.

9th. The decree should conform to these findings. And each and every of the said amendments the court, except as to the 3rd above, refused to make, and to the refusal thereof, defendant then and there excepted. And to the entry and making and filing of each and every of said findings defendant then and there duly excepted, and also to the entry of a decree thereon, and thereupon said defendant was given by the court thirty days time from the filing of said findings, on the 30th day of July, 1889, in which to prepare, serve and file, notice of motion, motion and statement upon motion for new trial and said motion, notice of motion and statement were filed within said thirty days.

The defendant assigns and relies upon the following.

Assignments of Error.

1. The court erred in overruling the defendant's demurrer to the complaint herein.

2. The evidence is insufficient to justify the third finding of fact in this, the evidence shows that said property is valuable for other things than only the ores found therein.

3. The evidence is insufficient to justify the fourth finding of fact in this, the evidence fails to show that there is any mortgage debt.

4. The 11th finding of fact is not a finding of fact at all,
8 but a statement not justified by the evidence, because the evidence shows that all the material allegations of the answer are true.

5. The evidence shows that the value of the premises omitted from the deed from the Wasatch Co. to the Crescent Co. was at the time the deed was made far greater than the value of the premises included in said deed, at least three times as great, and constituted the only inducement to the defendant to purchase the ground, and that the said premises were omitted from said deed by mistake.

6. The evidence shows that the defendant is not a party to the suit of The Wasatch Mining Co. *vs.* Jennings, *et al.*, mentioned in the findings, and had no right or power to appear therein and procure any order for the deposit of money into court in said cause, and that plaintiff has not procured or attempted to procure any such order to be made, and has never taken any steps therefor, or

notified the defendant to take any steps to have such order made, or to make said deposit with the clerk of this court.

7. The evidence shows that there is no debt due at this time to either the Wasatch Mining Company or to any other corporation or to any person or has ever been due, and since no debt is or ever has been due there can be no interest due, and the giving of interest to the plaintiff upon the sum mentioned in the mortgage and the requiring of interest to be paid thereon, is not justified by, but is contrary to the evidence given in this cause, nor by the pleadings or the law.

8. The court erred in allowing attorney's fee, because the evidence shows that no foreclosure can be had in this cause, but that it is simply a suit for further security, and therefore since no foreclosure can be had the allowance of attorney's fees in the sum of one thousand dollars, or in any other sum, is not warranted by the evidence.

9 9. The court erred in inserting the words "to be" before the word "recognized" in said findings of fact and conclusions of law.

10. The court erred in its conclusions of law herein in the first conclusion in requiring payment into court and in requiring interest to be paid thereon; in the second conclusion of law, in allowing either attorney's fees or costs, and in the third conclusion of law, because the said conclusions of law are not the legal deduction from the evidence in the cause or from the findings of fact herein, and therefore are not conclusions of law.

11. The court erred in entering decree herein, because the said decree is not the legal result from the said findings and has no warrant or justification in law and is unwarranted by the record.

The foregoing statement containing all the evidence in the cause is by me, this 9th day of November, 1889, settled and approved in connection with the exhibits hereto, and certified to be correct. The exhibits are attached hereto and referred to in the statement and made a part hereof.

T. J. ANDERSON,
Judge of the District Court of the Third Judicial District of the Territory of Utah.

The above statement is agreed to and certified to be correct. November 9th, 1889.

J. G. SUTHERLAND & W. H. DICKSON,
Attorneys for Plaintiff.
BASKIN & VAN HORNE & JOHN M. ZANE,
Attorneys for Defendant.

Filed November 9, 1889.

10 EXHIBIT A.

In the District Court of the Third Judicial District of the Territory of Utah.

THE CRESCENT MINING COMPANY, Plaintiff,
vs.
THE WASATCH MINING COMPANY, Defendant.

And now comes the said plaintiff, and by leave makes this its amended complaint, and alleges, that said parties, plaintiff and defendant, are and said plaintiff for more than four years last past, and defendant for more than fifteen years last past, has been each a corporation, organized and existing under the laws of Utah Territory, authorized to purchase, hold, work and sell mining claims and property.

Plaintiff further alleges that on, and prior to, the 18th day of October, A. D. 1873, the said defendant was the owner, and in the possession of, the Walker and Walker Extension mines, and the Buckey mine, situated in the Uintah mining district, Summit county, Utah Territory. That the said mining claims and property lie contiguous, that they have been officially surveyed, and patents issued therefor from the United States; and according to said surveys and patents the exterior boundaries thereof, with magnetic variation at 17 deg. 30 min. east, are as follows, viz.: Beginning at corner No. 1 of the Walker and Walker Extension mine, and running thence N. 44 deg. 35 min. W. two hundred and twenty (220) feet to corner No. 2 of said mine, from which U. S.
11 mineral monument No. 4 bears S. 46 deg. 10 min. W. at the distance of one hundred and fifty-eight (158) feet, thence S. 21 deg. 15 min. W. one hundred and ninety-six (196) feet to corner No. 3; thence S. 68 deg. 5 min. W. twenty-eight hundred and four (2,804) feet to corner No. 4; thence S. 44 deg. 35 min. E. two hundred and sixteen (216) feet to corner No. 5; thence N. 68 deg. 5 min. E. fourteen hundred and ten (1,410) feet to corner No. 3 of the Buckey mine; thence S. 44 deg. 35 min. E., along the southerly end line of said Buckey mine, one hundred thirty (130) feet to corner No. 4 thereof; thence N. 68 deg. and 5 min. E. fourteen hundred (1,400) feet to corner No. 1 of said last-mentioned mine; thence N. 44 deg. 35 min. W. one hundred and thirty (130) feet to corner No. 2 of said Bucky mine—the same being also corner No. 6 of the said Walker and Walker Extension mine; thence N. 21 deg. and 15 min. E. one hundred and ninety (190) feet to the place of beginning.

That while the said defendant was so the owner and in possession of the whole of the said mining claims, as above described, James Lowe and others, the owners of the Pinyon and Pinyon Extension mine, applied for and obtained a patent from the United States, of said last-named mine, bearing date of the said 18th day of October, A. D. 1873. That the said Pinyon and Pinyon Extension mine, as

the same was located, crossed, overlapped and conflicted with the said Walker and Walker Extension and Buckey mines; and by mistake and error in the said application, the same included a portion of the said Walker and Walker Extension and Buckey mines; and the said patent to said James Lowe and others, so obtained in pursuance of said application, erroneously included all that portion of the said last-named mines, bounded and particularly described,

with magnetic variation as aforesaid, as follows, to wit: Be-
12 ginning at corner No. 1 of the said Walker and Walker Extension mine, as the same was officially surveyed and patented, and running thence N. 44 deg. 35 min. W. one hundred and ninety (190) feet to intersection of westerly side line of lot No. 42, being the Pinyon and Pinyon Extension mine; thence S. 32 deg. W. 155 feet to intersection of northwesterly boundary line of said Walker and Walker Extension mines; thence S. 21 deg. 15 min. W., along said boundary line, 32 feet to corner No. 3 of said Walker and Walker Extension claim; thence S. 68 deg. and 5 min. W. 10 feet to intersection of the westerly side line 32 deg. W. on said side line of said lot No. 42; thence S. 510 feet, more or less, to intersection with southerly boundary line of the Buckey mining claim; thence N. 68 deg. 5 min. E., along said last-mentioned line, 339 feet to intersection of easterly boundary line of said lot No. 42; thence N. 32 deg. E., on said last-named boundary line, 300 feet to intersection of the easterly boundary of said Walker and Walker Extension claim; thence, on said boundary line of the last-named claim, N. 21 deg. 15 min. E. 89 feet to said corner No. 1, the place of beginning.

That the said portion of the said Walker and Walker Extension and Buckey mines, so included and embraced in the said patent of the Pinyon and Pinyon Extension mine, was at all times known, understood and recognized by all the owners of and parties interested in, each of the said three mines, to belong to and constitute a part of the said Walker and Walker Extension and Buckey mines, respectively. That the discovery points of each of the said mines, viz.: the Walker and Walker Extension and Buckey mines, is included within the boundaries of the area last above described, and so as aforesaid erroneously embraced within the said patent of the Pinyon and Pinyon Extension mine; that in recognition of the

rights of the said defendant to the premises last aforesaid, and
13 to correct the errors in the said application and patent, the grantees therein, afterwards, to wit, on or about the 28th day of October, A. D. 1874, executed and delivered to the defendant a deed conveying to it and to its successors and assigns the said premises.

And plaintiff further avers that subsequently, to wit: about the year A. D. 1879, William Jennings, since deceased, and Joseph A. Jennings, a son of the said William Jennings, went into possession of the said Walker and Walker Extension and Buckey mines, including the said portion thereof, so as aforesaid embraced in the said patent of the said Pinyon and Pinyon Extension mine, and claimed to be the owners of the whole thereof, and continued in the

possession and occupation of the whole of said premises, under said claim of ownership, until the 8th day of March, A. D. 1883. That after said William Jennings and Joseph A. Jennings went into possession of the said property, the said defendant, The Wasatch Mining Company, prior to the said 8th day of March, A. D. 1883, brought a suit in the third district court of Utah Territory against the said William Jennings and Joseph A. Jennings and Isaac Jennings, which suit is still pending in said court, and involves the title and ownership of the said mining property and premises.

That heretofore, to wit: on the 8th day of March, A. D. 1883, and while the said action was pending, the said William Jennings and Joseph A. Jennings, for a valuable consideration, to wit: the sum of fifty thousand dollars ($50,000) executed and deposited with the Deseret National Bank of Salt Lake City, a deed, by the terms of which they conveyed to the plaintiff herein, The Crescent Mining Company, the whole of the said Walker and Walker Extension and Buckey mines, including the portion thereof embraced within the said patent of the Pinyon and Pinyon Extension mine—a
14 copy of which deed is hereunto attached, marked Exhibit "A" and made a part hereof. That at the same time the said deed was executed, and as a part of the said transaction and sale, the said plaintiff, The Crescent Mining Company, as the party of the first part, and the said William Jennings and Joseph A. Jennings, as the parties of the second part, for a valuable consideration, to each of the said parties moving, entered into an agreement in writing in which, after reciting the execution of the said deed, and the pendency of the said action, it was mutually agreed by and between the said parties that the said deed, and also the said agreement, should be deposited in the said bank, and there held subject to the terms and conditions contained in the said agreement, that is to say, that whenever and as soon as the said action and the subject-matter of litigation therein involved should be finally determined, if such determination should be favorable to defendant therein, the said first party should pay to the said second parties the sum of forty-two thousand five hundred (42,500) dollars, the balance of the purchase price of the said property, the sum of seven thousand five hundred (7,500) dollars thereof having been paid at the time of citing said agreement, and upon the payment of the said sum of money the said deed was to be delivered to, and accepted by, the said first party; that said agreement also contained a provision that, if at any time before the final determination of said action and after three months from its date, the said second parties should execute and deliver to the first party their written agreement to save it harmless from all claims of the Wasatch Mining Company and the stockholders therein, to the title and ownership of the said property, the same should be accepted by the first party and it should then, after thirty days' notice, pay the said balance of the purchase-money.

15 It was also provided by said agreement that the first party should take immediate possession of all of the said property, but that until said deed should be delivered it should not extract or

remove therefrom any ores or valuable minerals. For a more particular statement of the terms and conditions of said agreement, reference is made to a copy thereof, which is hereto attached, marked Exhibit "B" and made a part of this amended complaint.

That in pursuance of the provisions of the said deed and agreement, the plaintiff herein, afterwards, to wit: on or about the 23d day of March, A. D. 1883, went into the possession and occupancy of the whole of the said property and premises, and has ever since, and does still hold, possess and occupy the same, and every part thereof.

That the powers of the plaintiff company are vested in, and exercised by a board of directors, who are authorized to, and do, direct and control all the business and affairs of said company.

And plaintiff further alleges and shows to the court that prior to, and at the time of the execution and deposit of the said deed and agreement in the said bank, E. P. Ferry was, and ever since has been, and is still a member of the board of directors of the plaintiff, The Crescent Mining Company, and during a considerable portion of the time since the making of said deed and contract, he was president and general manager thereof.

That during all of said time he has been and is personally familiar with the business affairs of said plaintiff, and actively engaged in assisting in carrying on and conducting the same.

That he had full knowledge and information of the execution and deposit in said bank of said deed and agreement at the time the same was done, and of the contents thereof; and also that in pursuance thereof the said plaintiff on or about the 23d day
16 of March, 1883, took possession of the entire property and premises, described in and conveyed by the said deed so deposited, and that in pursuance thereof and the terms of said agreement, it had ever since held, occupied and possessed the same and every part thereof.

That said William Jennings died at Salt Lake City, Utah, on the 15th day of January, 1886.

And plaintiff further alleges that heretofore, to wit, on or about the month of July, A. D. 1886, and while the said suit of the said defendant, The Wasatch Mining Company, originally against the said William, Joseph A. and Isaac Jennings, was still pending in said court, and undetermined, the plaintiff and defendant herein entered into negotiations whereby the plaintiff sought to have the said defendant agree to join with the parties claiming the title and ownership of said property adversely to it, in perfecting the title of all the said property in the plaintiff, The Crescent Mining Company. That the said E. P. Ferry being at that time a member of the board of directors of the said Crescent Mining Company as aforesaid, and having full knowledge and information of all the matters hereinbefore stated, and the said plaintiff and its other officers and agents, relying upon the knowledge of the said Ferry as to matters aforesaid, and trusting and confiding in his integrity and honesty, the said board of directors appointed him a member of a special committee of said board to carry on, conduct and conclude

the said negotiation on behalf of said plaintiff. That in pursuance of said negotiations the said parties, on the 9th day of July, 1886, entered into a contract, bearing date of that day, in which the said defendant, The Wasatch Mining Company, was the party of the first part, and the plaintiff herein was the party of the second part, by
17 which the said first party, in consideration of the agreements of the said second party therein contained, did promise and agree to join with the representatives and successors in interest of the said William Jennings, in conveying to said second party the Walker and Walker Extension and Buckey mining claims, in fee, according to the contract theretofore made between the said second party and the said William Jennings in his lifetime, on payment into the district court for the third judicial district of said Territory, subject to its order in the aforesaid action, in which the said Wasatch Mining Company was plaintiff and the said representatives of the said William Jennings and others were defendants, with effectual assurance by said second party that fifteen hundred shares of the first party's capital stock held by said Jennings and transferred by him at the making of said contract to said second party, should not participate in the distribution by said first party of said sum of forty-two thousand, five hundred (42,500) dollars, or that in default of such joint conveyance that said first party should convey in fee said property to the second party, after the final determination of said suit, if said first party should be decreed to be the owner thereof, on payment to said first party of said sum of forty-two thousand five hundred ($42,500) dollars, and said assurance relative to said fifteen hundred shares of said first party's capital stock as aforesaid. In consideration of said agreements on the part of the said first party, the said second party in and by said agreement bound itself, on receiving a deed as aforesaid, to pay the said sum of forty-two thousand five hundred dollars in the manner thereinbefore indicated, and to give assurance as stated as to non-participation in the distribution of said sum of fifteen hundred shares of said first party's capital stock. It was in and by said contract further mutually agreed that if said first party should join with the
18 representatives of said William Jennings in conveying said property and said second party should desire reasonable further time to make payment into court of said sum of money, said first party would consent to allow such further time, not exceeding one year, then to be agreed on, upon satisfactory security being given for said payment at the agreed time. A copy of said agreement is hereto attached, marked Exhibit "C," and made a part hereof.

And the plaintiff avers that in entering into said agreement it was the understanding and intention of each of the parties thereto to include in said contract the whole of the property contained in the description first set forth in this amended complaint, and as described in the said deed and agreement between William and Joseph A. Jennings and the said Crescent Mining Company hereinbefore referred to, of which copies are hereto attached and marked Exhibit "A" and "B," respectively.

That at the time of entering into said contract, the parties acting in that behalf made application to the said Deseret National bank to see the said contracts Exhibit "B," for the purpose of obtaining and inserting the full and exact description of the said property in said contract, but the said contract Exhibit "B," could not at that time be found, and it was thereupon referred to in said contract Exhibit "C," as the contract of William Jennings and the said Crescent Mining Company. That no other contract was ever entered into or was or is in existence between William Jennings and this plaintiff, than the said Exhibit "B," and on information and belief the plaintiff alleges that the time of entering into the aforesaid contract Exhibit "C," the said E. P. Ferry well knew that the same was understood and intended by both parties thereto, to include all the said property and premises included in the said deed and contract, Exhibit "A" and "B," and that the reference to said
19 contract of Jennings Exhibit "B" was for the purpose of effecting and carrying out that intention, and in consequence of the fact that the said parties acting in that behalf did not at the time have in their possession a full and particular description of said property.

And plaintiff alleges that notwithstanding all the facts aforesaid the said E. P. Ferry, while continuing to act in behalf of this plaintiff as such director and member of said special committee, did accept a deed of a portion of said premises so contracted for, a copy of which is hereto attached, marked Exhibit "D," and made a part hereof. That, as plaintiff is informed and believes, and thereupon alleges, said Ferry in accepting said deed fraudulently combined and conspired with certain of the officers and agents of the said defendant, The Wasatch Mining Company, and other persons to the plaintiff unknown, to cheat, wrong and defraud the plaintiff by accepting the said deed as a compliance with and satisfaction of the said contract Exhibit "C," and in pursuance of said fraudulent purpose the said Ferry did falsely pretend and represent to the plaintiff and its officers that the said deed was in conformity with the provisions of the said contract between plaintiff and defendant, he then and there well knowing that the same did not so conform, that it did not include that portion of the property and premises hereinbefore described as being the area in conflict between Pinyon and Pinyon Extension claims and the Walker and Walker Extension and Buckey claims, and which was covered and included in said contract Exhibit "C," as aforesaid.

That the plaintiff, relying upon and confiding in the integrity and honesty of the said Ferry, was deceived and mislead by his said representation; that said deed included all the property contracted for by plaintiff, and thereupon acquiesced in the acceptance
20 of said deed until the time hereinafter stated, believing the same to so include all of said property. At the time of making said contract of July 9th, 1886, Exhibit "C," the sum of $2,500 cash was paid by plaintiff to defendant, upon the consideration of the purchase of the property so intended to be conveyed; and on the delivery of the deed last aforesaid the payment of the remainder

of such purchase-money, to wit: forty-two thousand five hundred dollars, was, by a mortgage of even date with said deed, given by plaintiff to defendant, upon the entire real property of plaintiff of value greatly exceeding said last-mentioned sum, fully secured to be paid.

And as plaintiff is informed and believes, and upon such information and belief alleges, that the said Ferry and said other persons entered into said conspiracy to defraud the plaintiff by omitting the said portion of said property from the said deed, and afterwards procuring the title thereof himself, directly or through some of his said confederates, and holding the same adversely to the plaintiff. That in the further prosecution of said fraudulent purpose the said E. P. Ferry, as the plaintiff is informed and believes, and alleges the fact to be, has been lately engaged in negotiating with the defendant, and certain of its officers, to purchase the said property so fraudulently omitted from the said deed; and the said defendant threatens to sell and will sell, and convey the said property to the said Ferry or some other person, and thereby further cloud the equitable right and title of plaintiff to the said property, unless restrained by the order of this court. Plaintiff further alleges that it did not discover the omission in said deed so accepted on its behalf until the day of the filing of the original com*com*plaint herein, and that its attention was then called to the fact by having then for the first time learned that the said Ferry was about to purchase from the said defendant the said portion of said property so
21 omitted from said deed. That the said plaintiff has demanded of the said defendant that it correct the said deed so as to include the said premises so omitted, and make the same conform to the said contract, Exhibit "C," but the said defendant fails and refuses so to do. That all of the said acts of the said defendant and its said officers, are in violation of the rights of the plaintiff and contrary to equity and good conscience, and the said acts of the said E. P. Ferry are in violation of his trusts and duties and obligations to the plaintiff as one of its board of directors, and its special agent to transact the business aforesaid.

Wherefore, the plaintiff, as in its original complaint prays, that all of the said property and premises be adjudged and decreed to be the property of the plaintiff, free and clear of and from all claims and conveyances of any other person or persons whatsoever; that the defendant be required to correct and reform the said deed Exhibit "D" by executing and delivering to plaintiff a good and sufficient deed conveying all and singular the premises and property in this amended complaint first described; that the said defendant, its officers, agents, and attorneys, and each and every of them, and all other persons whatsoever acting by, through or under it, be enjoined and restrained from selling, conveying or incumbering the said property or any part thereof, or doing any other act whatsoever that will in anywise affect, interfere with or cloud the title of the said property or any part thereof; that the plaintiff have such other

and further relief in the premises as may be equitable, and that it have and recover its costs herein.

P. L. WILLIAMS AND
E. T. SPRAGUE,
Plaintiff's Attorneys.

22 TERRITORY OF UTAH, } ss:
Salt Lake County, }

J. R. Nichols being first duly sworn, on his oath says that he is an officer of the plaintiff company in the above-entitled action; to wit: the vice-president thereof, and that he makes this verification for and on its behalf; he further says that he has read the foregoing amended complaint and knows and understands the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those he believes it to be true.

J. R. NICHOLS.

Subscribed and sworn to before me this 31st day of January, 1887.
[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

EXHIBIT A.

This indenture, made and entered into the eighth day of March, in the year of our Lord one thousand eight hundred and eighty-three, between William Jennings and Joseph A. Jennings, both of the city and county of Salt Lake, in the Territory of Utah, the parties of the first part, and the Crescent Mining Company, a corporation created and existing under and by virtue of the laws of said Territory, the party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of fifty thousand (50,000) dollars, lawful money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have remised, released and forever quitclaimed, and by these presents do remise,
23 release and forever quitclaim unto the said party of the second part, and to its successors and assigns, the following-described mining property and ground and premises, situated in Uintah mining district, Summit county, Utah Territory, bounded with magnetic variations at 17 deg. 20 min. east, as follows, to wit: Beginning at corner No. 1, of the Walker and Walker Extension mine, and running thence N. 44 deg. 35 min. W. two hundred and twenty (220) feet to corner No. 2 of said mine, from which United States mineral monument No. 4 bear- S. 46 deg. 10 min. W. at the distance of one hundred and fifty-eight (158) feet; thence S. 21 deg. 15 min. W. one hundred and ninety-six (196) feet to corner No. 3; thence S. 68 deg. 05 min. W. twenty-eight hundred and four (2,804) feet to corner No. 4; thence S. 44 deg. 35 min. E. two hundred and sixteen (216) feet to corner No. 5; thence N. 68 deg. 05 min. E. fourteen hundred and — (1,410) feet to corner No. 3 of the Buckey mine,

thence S. 44 deg. 35 min. E. along the southerly end line of said Buckey mine one hundred and thirty (130) feet to corner No. 4 thereof; thence N. 68 deg. 05 min. E. fourteen hundred (1,400) feet to corner No. 1 of said last-mentioned mine; thence N. 44 deg. 35 min. W. one hundred and thirty (130) feet to corner No. 2 of said Buckey mine, the same being also corner No. 6 of the said Walker and Walker Extension mine, thence N. 21 deg. 15 min. E. one hundred and ninety (190) feet to the place of beginning, the said described premises being mineral entries Nos. 87 and 88, lots 40 and 41, and patented as the Walker and Walker Extension and Buckey mining claim. Together with all dips, spurs and angles, and also all metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant or appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments
24 and appurtenances thereto belonging or in anywise appertaining, and all the rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

[SEAL.] WILLIAM JENNINGS.
JOSEPH A. JENNINGS.

Signed, sealed and delivered in the presence of—
JOSEPH F. SIMMONS.
CHARLES W. STAYNER.

UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

On this thirteenth day of March, A. D. one thousand eight hundred and eighty-three, personally appeared before me, Joseph F. Simmons, a notary public duly appointed, qualified, and commissioned in and for said county, Joseph A. Jennings, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and duly
25 acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal at my office in Salt Lake City, U. T., the day and year in this certificate first above written.

[SEAL.] JOSEPH F. SIMMONS,
Notary Public, Salt Lake County, U. T.

UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

On this twenty-third day of March, A. D. one thousand eight hundred and eighty-three, personally appeared before me, Charles W. Stayner, a notary public, duly appointed, qualified and commissioned, in and for said county, William Jennings, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal at my office in Salt Lake City, Utah Territory, the day and year in this certificate first above written.

[SEAL.] CHARLES W. STAYNER,
Notary Public, Salt Lake City, Salt Lake County, U. T.

26 EXHIBIT B TO EXHIBIT "A."

This agreement, made and entered into this eighth day of March, A. D. 1883, between the Crescent Mining Company, a corporation under the laws of Utah Territory (hereinafter designated as the party of the first part), the party of the first part, and William Jennings and Joseph A. Jennings, both of the city and county of Salt Lake, in said Territory, (hereinafter designated as the second parties), the parties of the second part, witnesseth: That whereas, the said second parties have sold, and by deed bearing even date herewith, conveyed to the said first party, the Walker and Walker Extension and Buckey mining claims, situated in Uintah mining district, Summit county, in said Territory, more particularly described in said deed, and for which purpose reference thereto is hereby *named;* and whereas, an action is now pending in the district court of the third judicial district of said Territory, wherein The Wasatch Mining Company as plaintiff and the said second parties and Isaac Jennings are defendants, which action involves the title and ownership of the said mining claims.

Now it is hereby mutually covenanted and agreed by and between the parties hereto, that the said deed, together with this agreement, shall be deposited with the Deseret National Bank of Salt Lake City, and there held subject to the following conditions, to wit: whenever and as soon as the said action and the subject-matter of litigation therein involved shall have been finally determined, if such determination and decision be favorable to the said defendants, that is to say, if by such decision it shall be held and determined that the title and ownership of the said property is in the said defendants, the said first party is to pay the second parties the

27 sum of forty-two thousand five hundred dollars ($42,500), being the balance of the purchase price of the said property, the sum of seven thousand five hundred (7,500) dollars thereof nav-

ing been paid at the time of the signing this agreement; and upon the payment of the said sum of money the said deed is to be delivered to, and accepted by the said first party.

If at any time before the termination of the said action, and after three months from date, the said second parties shall execute and deliver to the first party their written agreement, covenanting and guaranteeing to save harmless the said first party from all claims of the said Wasatch Mining Company and the stockholders therein to the title and ownership of the said property, the same shall be then accepted by the said first party, and it shall thereupon, on thirty days notice pay to the said second parties the aforesaid sum of money, the balance of said purchase price of said property.

On the execution of this agreement the first party is to go into the possession and occupancy of the said property; but until the delivery to it of the said deed it is not to take out of, or remove, nor suffer to be taken out or removed, from within the boundaries of the premises described in the said deed, any metal, ores or other minerals or substance of value; and for the purpose of satisfying them that this condition and stipulation is being kept and performed, the said second parties shall have the right and privilege of visiting and inspecting the underground workings and openings in said property from time to time, and as often as once in each week. The said first party may at any time, at its option, pay the balance of the said purchase-money into the said bank, and thereupon the said deed shall be delivered to it. If at any time the first party shall obtain a conveyance of the said property from the said Wasatch Mining Company and a waiver of their claim
28 thereto by the stockholders therein, it shall thereupon be entitled to a delivery of the said deed upon paying the said balance of the purchase-money.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

[The Crescent Mining Company Seal.]

CRESCENT MINING COMPANY,
By R. N. BASKIN, *Vice-President*,
C. L. HAINES, *Secretary*,
AND ARTHUR BROWN,
M. KIRKPATRICK,
R. N. BASKIN,
Special Committee Duly Authorized for that Purpose.
WILLIAM JENNINGS. [SEAL.]
JOSEPH A. JENNINGS. [SEAL.]

EXHIBIT C TO EXHIBIT "A."

It is mutually agreed by and between the Wasatch Mining Company, a corporation organized under the laws of Utah Territory, of the first part, and the Crescent Mining Company, a corporation also organized under the laws of Utah Territory, of the second part, as follows, that is to say:

Said party of the first part in consideration of the agreement o
the part of the second party, hereinafter set forth, hereby agre
with said second party, its successors and assigns, to join with th
representatives and successors in interest of William Jennings, co
veying to the said second party these two patented mining claim
situated in Uintah mining district, Summit county, in the Territor
of Utah, called the "Walker and Walker Extension" and "Buckey
mining claims, in fee, according to the contract heretofor
made between said second party and William Jenning
in his lifetime, on payment into the district court for th
third judicial district of said Territory, subject to the order of th
court in an action in which said first party is plaintiff and said re
resentatives of William Jennings and others are defendants, wit
effectual assurance by said second party that fifteen hundred share
of first party's capital stock held by said Jennings, and transferre
by him at the making of said contract, to said second party, sha
not participate in the distribution by said first party of said sum o
forty-two thousand five hundred dollars; or that in default of suc
joint conveyance that said first party will convey in fee said prop
erty to said second party after the final determination of said sui
if said first party shall be decreed to be the owner thereof, on pay
ment to said first party of said sum of forty-two thousand five hun
dred dollars, and said assurance relative to said fifteen hundre
shares of said first party's capital stock as aforesaid.

Said second party, in consideration of the foregoing agreement o
the part of said first party, hereby agrees and binds himself, on re
ceiving deed as aforesaid, to pay as aforesaid the sum of forty-tw
thousand five hundred dollars, in the manner hereinbefore in
dicated, and to give assurance as above stated as to non-participa
tion in the distribution of said sum of fifteen hundred shares of sai
first party's capital stock.

It is mutually agreed that if said first party shall join with th
representatives of William Jennings in conveying said property, an
said second party shall desire a reasonable further time to mak
payment into court of said sum of money, said first party will con
sent to allow such further time not exceeding one year, then to b
agreed on, on satisfactory security being given for said payment a
the agreed time.

In witness whereof the parties have respectively executed
this agreement, this ninth day of July, A. D. 1886.

WASATCH MINING COMPANY,
Per N. W. CLAYTON, *Secretary.*

Pursuant to the order of the board of directors July ninth, 1886

CRESCENT MINING COMPANY,
By W. S. McCORNICK,
By EDWARD P. FERRY,
Special Committee.

EXHIBIT D TO EXHIBIT "A."

This indenture, made the first day of September, in the year of our Lord one thousand eight hundred and eighty-six, between the Wasatch Mining Company, a corporation organized under the laws of Utah Territory, the party of the first part, and the Crescent Mining Company, a corporation organized under the laws of Utah Territory, the party of the second part, witnesseth: that the said party of the first part, for and in consideration of the sum of forty-two thousand five hundred dollars to it in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, conveyed and quitclaimed, and by these presents doth grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part, and to its successors and assigns forever, all the right, title and interest, estate, claim and demand, both in law and equity, as well in possession as in expectancy of the said party of the first part, of, in or to that certain portion, claim and mining right, title or property on those certain veins or loads of rock containing precious metals of gold, silver and other
31 metals, and situate in the county of Summit and Territory of Utah, and described as follows, to wit: Those patented mining claims situate in Uintah mining district, in said county and Territory, named respectively the "Walker and Walker Extension mine," as described in patent from the United States to said party of the first, dated November 6th, 1874, and recorded in the office of the recorder of said county, in Book E, on pages 19 to 26; and also the "Buckey" mine, as described in patent from the United States to said party of the first part, dated November 6th, 1874, and recorded in the office of the recorder of said county, in Book E, on pages 27 to 34.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments or appurtenances thereto belonging, and the rents, issues and profits thereof, and also all the estate, right, title, interest, possession, claim and demand whatsoever of the said party of the first part, of, in or to the premises, and every part and parcel thereof.

To have and to hold, all and singular the premises with the appurtenances and privileges thereto incident unto the said party of the second part.

And the party of the first part doth hereby agree to and with the party of the second part that it hath full right and power to sell and convey the said premises, and that the said premises are now free and clear from all incumbrances, sales or mortgages made or suffered by the said party of the first part.

In witness whereof, said party of the first part hath hereunto

set its name and corporate seal the day and year first above written.

32 WASATCH MINING CO. [SEAL.]
By H. B. CLAWSON, JR., *President.*

Attest: NEPHI W. CLAYTON,
Secretary Wasatch Mining Company.

(Wasatch Mining Company corporate seal.)

Sealed and delivered in the presence of—
J. L. PERKES,
M. E. CUMMINGS.

TERRITORY OF UTAH, } ss:
Salt Lake County, }

On this eleventh day of October, A. D. one thousand eight hundred and eighty-six, before me, Melvin E. Cummings, a notary public in and for said Salt Lake county, duly commissioned and qualified, personally appeared the within-named H. B. Clawson, Jr., president of the Wasatch Mining Company, whose name is subscribed to the foregoing deed of conveyance as officer and agent of the granter therein, personally known to me to be the identical person mentioned in and who executed the same, and who duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned, as the act and deed of the Wasatch Mining Company.

In witness whereof I have hereunto set my hand and affixed my official seal, the day and year in this certificate first written.

MELVIN E. CUMMINGS,
Notary Public.

Melvin E. Cummings, Salt Lake county, Utah, notary public.

33 In the District Court for the Third Judicial District, Utah Territory.

THE CRESCENT MINING COMPANY, Plaintiff, }
vs.
THE WASATCH MINING COMPANY, Defendant. }

EXHIBIT B.

Said defendant, answering the amended complaint filed herein, denies: That the exterior boundaries of the Walker and Walker Extension and Buckey mines are as set out in said amended complaint, according to the official survey and patent thereof.

Said defendant denies that the parcel secondly described in said amended complaint, and alleged to be erroneously included in the patent of Pinyon and Pinyon Extension mines was any part of the Walker and Walker Extension or Buckey mine mining claims, according to the official survey and patent thereof; or was by mistake

or erroneously included in said Pinyon and Pinyon Extension patent.

Said defendant denies that the parcel last aforesaid, which is the parcel now in controversy, was at all times, or at any time since the making of said official survey and issuing of said patents, been known, understood or recognized by all or any of the owners or parties interested in each of the said blank claims, or by any of them to belong to or constitute a part of said Walker and Walker Extension and Buckey mines respectively; but all such owners and persons interested knew, understood and recogeized the said last-mentioned parcel as a part of said Pinyon and Pinyon Extension
34 mining claim, as patented, of which in fact it was a part and belonging to said defendant under and by virtue of a deed of conveyance to it in fee from the patentees of said Pinyon and Pinyon Extension claim, and not otherwise; and the defendant denies that the said conveyance was made to correct any errors in the application for the patent of said Pinyon and Pinyon Extension mining claim, but was made upon a valuable consideration. Said defendant, on information and belief, denies that William Jennings and Joseph Jennings, or either of them, in the year of 1879, or at any time, went into possession of the premises so conveyed to defendant by said deed, being the premises now in controversy; they had a mortgage of the said Walker and Walker Extension and Buckey mining claims as patented, and took and held tortious possession thereof during the period mentioned in that behalf in said amended complaint, but had no color of title whatever to or interest in or lien or charge on said premises in controversy. And this defendant avers that said mortgage was in the form of a deed from the United States marshal for that Territory, founded on three sales of said Walker and Walker Extension and Buckey mines under executions against this defendant; that answer hereto as part of this answer and marked "Exhibit A," is a copy of one of the certificates of sale under one of said executions, and the other certificate contains the same description; one of them shows a sale to John Danielson and the other a sale to Swen Olsen.

The said defendant denies that the suit of this defendant against said William Jennings, Joseph A. Jennings and Isaac Jennings involved the title and ownership of the parcel now in controversy, but only an alleged trespass by them thereon, that only the title and ownership of said Walker and Walker Extension and Buckey
35 mining claims, as patented, was involved in said action; that a decree thereon has been rendered in favor of said defendant herein, for conveyance of said claims to said defendant, and for thirty-three thousand dollars, and more, for ores extracted therefrom by them. This defendant has no information or belief sufficient to answer whether, while said action was pending, or at any time, said William Jennings and Joseph A. Jennings upon a valuable consideration or otherwise, executed and deposited with the Deseret National Bank of Salt Lake City a deed by the terms of which they conveyed to the plaintiff herein the whole of the said Walker and Walker Extension and Buckey mining claims, including therein

the portion now in controversy, as set forth in said amended complaint and Exhibit "A" attached thereto, nor neither as a part of said transaction and sale, the said plaintiff or the party of the first part and said William Jennings and Joseph A. Jennings, as parties of the second part, for a valuable consideration entered into an agreement of the tenor in that behalf set forth in said complaint and in Exhibit B thereto attached, and therefore this defendant denies said allegations, respectively.

This defendant denies on information and belief that said plaintiff, in pursuance of said alleged agreement, went into possession of the premises now in controversy, or any part thereof, and if said plaintiff has any possession thereof, it acquired no right to take such possession from said contract, because said Jennings had no color of title thereto, and the same was taken without the knowledge or consent of the defendant; and is a tortuous possession, and this defendant on information and belief denies that said Ferry knew at any time that said plaintiff had or claims to have possession of said parcel now in controversy.

Said defendant denies that on or about the 9th day of July,
36 1886, or at any time, the plaintiff and defendant entered into any negotiations whereby the plaintiff sought to have the defendant agree to join with the parties claiming the title and ownership of any property, including the premises in controversy, adversely to defendant, in perfecting the title to all said property, including the premises in controversy, in the plaintiff, but such negotiations were had relative to said Walker and Walker Extension and Buckey mining claims as patented, but relating to no other property in whole or in part that such negotiations resulted in a contract which was made and executed in the terms contained in Exhibit C, attached to said amended complaint but deceptively recites in the body of said amended complaint.

Said defendant denies that in entering into said agreement it was the understanding or intention of each or either of the parties thereto, to include in said contract the premises now in controversy, or any part thereto, or to include any other property than that granted to the defendant by the patents of the Walker and Walker Extension and Buckey mining claims, and this defendant alleges that it was well known to plaintiff and to E. P. Ferry, one of its agents named in said amended complaint, in said negotiation, and at the time of making said agreement, annexed to said amended complaint in Exhibit C, that said William Jennings and Joseph A. Jennings has no color of title to, or interest in, or claim on the premises now in controversy, and that the said negotiations and agreement had no reference whatever thereto. Said defendant denies on information and belief that at the time of entering into said contract or agreement any person acting in behalf of this defendant made any application to said Deseret National bank to see the contract referred in said complaint as Exhibit B, attached thereto, for any purpose.

And this defendant denies that said contract referred to in
37 said amended complaint as Exhibit "B," attached thereto,

was the only contract between William Jennings and said plaintiff; and this defendant denies on information and belief that at the time of entering into said contract attached to said amended complaint as Exhibit "C," said E. P. Ferry knew that it was understood or intended by both parties thereto to include therein the premises now in controversy; and defendant avers that the said E. P. Ferry knew that it was not the intention of said parties to include said premises; and defendant denies that the reference in said contract was a reference or intended to be a reference to said Exhibit "B," attached to said amended complaint; and defendant denies that said reference was inserted because the parties acting in that behalf did not have in their possession the full and particular description of the property, and avers that they had a full and particular description in the patents of all said claims. Said defendant denies that said E. P. Ferry accepted defendant's deed, or as defendant is informed and believes, ever saw it, and this defendant denies that said defendant executed any deed upon said contract marked Exhibit "C," attached to said amended complaint. Said defendant alleges that a deed was made to said plaintiff by said defendant, pursuant to a modified bargain in the negotiations, of which said E. P. Ferry took no part, and a final agreement between the parties was reduced to writing only in said deed from said defendant to said plaintiff, and in the plaintiff's mortgage, for the consideration. A copy of said deed is attached to said amended complaint and marked Exhibit "D," and a copy of said mortgage is hereto attached as part of this answer and marked Exhibit "B." That said deed was delivered to the secretary of the said plaintiff, C. H. Withey, and the mortgage delivered by him. This defendant avers that E. P. Ferry, who is charged in said complaint with fraud in
38 connection with the preparation and exchange of the deed and mortgage, was in no way, to the knowledge of this defendant, connected with said transaction, and he was not present when that part of the business was done.

On information and belief this defendant denies that said plaintiff was deceived and misled by said Ferry's representations relative to said deed or otherwise; this defendant denies that said plaintiff was misled or deceived at all, and this defendant avers that said deed included all the property intended to be included therein. It included all the property which was the subject of negotiation, all that either party understood or supposed to be included therein. This defendant denies all conspiracy with said Ferry to withhold, or that there has been withheld from plaintiff any part of the premises negotiated for or agreed by defendant to be sold, or for any purpose. And defendant denies on information and belief that said Ferry misled or deceived the plaintiff, or made any false representations to plaintiff, or in any manner influenced the plaintiff in the acceptance of said deed or in any acquiescence therein. This defendant denies that at the time of entering into said contract of July 9th, 1886, or at any time, the sum of $2,500.00, or any other sum, was paid by plaintiff to defendant upon the consideration of the purchase of the property intended to be conveyed.

As this defendant has never negotiated with plaintiff to sell to plaintiff the premises in controversy, the plaintiff has never offered to defendant to buy it, or offered any sum therefor, and therefore the plaintiff has no right to the restraining order of this court to prevent this defendant from selling the said premises to any purchaser, and this defendant denies that the plaintiff has ever demanded of it, except by bringing this suit, to correct said deed or to make the same conform to said contract referred to in said complaint as Exhibit "C."

39 This defendant alleges that no contract in writing was ever made between said defendant and plaintiff for sale of said premises in controversy, and the said defendant will insist on the benefit of the statute of frauds, namely, section 1 of the act entitled, "An act to punish frauds," approved February 18th, 1876, of Utah Territory, being section 1010 of the Compiled Laws of said Territory.

Wherefore the defendant prays to be hence dismissed with its costs.

SUTHERLAND & McBRIDE,
W. H. DICKSON,
Defendant's Attorneys.

EXHIBIT B.

This indenture, made this first day of September, in the year one thousand eight hundred and eighty-six, between the Crescent Mining Company, a corporation organized under the laws of Utah Territory, party of the first part, and the Wasatch Mining Company, a corporation organized under the laws of said Territory, party of the second part, witnesseth:

Whereas, first party heretofore made a contract with William Jennings, Joseph A. and Isaac Jennings for the purchase from them as owners of those certain patented mining claims, situated in Summit county, Territory of Utah, called and patented by the name of the Walker and Walker Extension and Buckey mining claims, for the sum of fifty thousand dollars, and paid on the purchase-money to said vendors the sum of seven thousand five hundred dollars, receiving then as part of said purchase fifteen thousand shares of the capital stock of said Wasatch Mining Company.

And, whereas, said second party, claiming to be the owner
40 of said properties, heretofore, brought suit against said William Jennings, Joseph A. Jennings and Isaac Jennings in the district court for the third judicial district of Utah Territory, for the recovery thereof, which suit is still pending against said Isaac Jennings, Joseph A. Jennings and the representatives of said William Jennings, now deceased.

And whereas, said second party has conveyed all its rights, title and interest in and to said properties to said first party, pursuant to agreement heretofore made with said second party, for the sum of forty-two thousand five hundred dollars, its said first party agreeing that the fifteen hundred shares of the capital stock of said Wasatch Mining Company should not participate in the distribution of said

forty-two thousand five hundred dollars nor derive any benefit therefrom.

Now, wherefore, the said party of the first part, in consideration of the premises, and the sum of forty-two thousand five hundred dollars, in said conveyance, the receipt whereof is hereby acknowledged, hath granted, sold and conveyed, and by these presents doth sell, grant and convey unto said party of the second part, its successors and assigns forever, its group of mining claims, situated in Uintah mining district, Summit county, Utah Territory, bearing the following names, to wit: The Pinyon and Pinyon Extension mining claims, except a 2 and $\frac{55}{100}$ acres heretofore conveyed away, the Rebellion, the Hecla, the Ætna, the Tidal Wave, the Mulkahy, the Shamos O'Brien, the Climax, the James A. Garfield, the Samuel, the Bible Back, the Senate and the Fallon mining claims; and also the said Walker and Walker Extension and the Buckey mines and mining claims, also, the Crescent tramway from said mines to Park City, with all the equipment thereof, belonging to the said first party, also the concentrating mill and land, and improvements connected therewith at said Park City, and including the vein, veins, or
41 lodes, and all the mineral-bearing rock and ores in said mining claims or thereto pertaining; and also all the tenements, hereditaments and appurtenances thereto belonging, to have and to hold the said several properties with the veins, lodes, minerals, ores and appurtenances, aforesaid, unto the said party of the second part and to its successors and assigns forever.

This conveyance is intended as a mortgage to secure the payment of forty-two thousand five hundred dollars in one year from the date hereof, which sum said first party agrees to pay at the time aforesaid; and said payment shall be made as follows, to wit, absolutely, to said party of the second part, its successors or assigns, if, at said time said suit shall have been finally determined in favor of said second party, and its title to said Walker and Walker Extension and Buckey mining claims maintained and established, and the same is free of all encumbrances made or suffered by the said party of the second part, or if the said action is still pending at the end of a year from date, and all the parties thereto direct how such payment shall be made, it shall be made accordingly, but if the action is then pending and undetermined and no direction given by all the parties thereto, then, and in that case, payment shall be made of said principal into said court in said action, recognized by order thereof, to be disposed of as follows: to be paid to said second party, its successors or assigns, on the final determination of said action in favor of said plaintiff and confirmation of its title to said last-mentioned property, the same being free of all incumbrances made or suffered by said second party, or assignment of the decree, except for costs, to said first party; and subject to be repaid to said first party, on its request or on its order, if said action be finally and on its merits determined adversely to said second party on its claim or title
42 to said last-mentioned property, and on payment being made as aforesaid of said sum of forty-two thousand five hundred dollars, as aforesaid, then these presents shall be void, and in case

default shall be made and the payment of said principal or any part thereof, then the said party of the second part, its successors or assigns, are hereby authorized and empowered to sell the said premises or any part thereof, in the manner prescribed by law, and out of the moneys arising from such sale to retain and pay the said principal, together with all costs and charges of making such sale and a reasonable attorney's fee for foreclosure or collection, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to said party of the first part, its successors or assigns.

In witness whereof the said party of the first part has hereunto set and affixed its corporate name and seal the day and year first above written.

CRESCENT MINING COMPANY,
By LEWIS A. WISTIAG, *President.*

Signed, sealed, and delivered in the presence of—
W. S. McCORNICK.

Attest: CHESTER H. WHISTING, *Secretary.*

STATE OF MICHIGAN, } ss:
County of Kent, }

On the fourth day of October, A. D. one thousand eight hundred and eighty-six, personally appeared before me, a notary public in and for said county, Lewis A. Wistiag, president of the Crescent Mining Company of Utah, personally known to me to be the
43 person herein described, and who executed the foregoing mortgage as said officer of the said Crescent Mining Company, described in said mortgage, who acknowledged to me that he executed the same fully and voluntarily, and for the uses and purposes therein mentioned as the act and deed of said Crescent Mining Company.

[SEAL.] MORTON F. NODENPYL,
Notary Public, Kent County, Michigan.

STATE OF MICHIGAN, } ss:
County of Kent, }

I, Cornelius L. Harvey, clerk of said county (and *ex officio* clerk of the circuit court thereof, being a court of record of common law jurisdiction) do hereby certify that Anton G. Hodenpyl, Esq., before whom the above and foregoing instrument appears to have been acknowledged, is and was at the date of making such acknowledgment, and certifying thereto, a notary public within and for said county, duly commissioned, qualified and sworn, and authorized by the laws of said State, to take such acknowledgment, and to certify the same, and I further certify that I am acquainted with the said handwriting of said Anton G. Hodenpyl, and believe his signature appended to the above certificate of acknowledgment to be genuine, and that the said instrument is executed and acknowledged according to the laws of the State of Michigan.

In witness whereof I have hereunto set my hand and official seal at the city of Grand Rapids, this 4th day of October, A. D. 1886.

CORNELIUS L. HARVEY, *Clerk*,
By FRANK P. CARPENTER, *Deputy*.

44 I, William Nelson, United States marshal for the Territory of Utah, do hereby certify, that by virtue of an execution issued out and under the seal of the district court of the 3d judicial district of said Territory, on a judgment rendered in a justice court, in and for the first precinct of the county of Salt Lake, on the 2nd day of January, A. D. 1877, in favor of Gust. Norquist against the Wasatch Mining Company, a transcript of said judgment having been filed in the office of the clerk of said district court, said execution having been tested the 20th day of February, A. D. 1877, by which I was commanded to make the amount of $237.64 and $4.00 costs of suit, to satisfy said judgment with costs and interest thereon, out of the personal property of said Wasatch Mining Company, defendant in said action, and if sufficient personal property could not be found, out of the real property belonging to said defendant.

I have levied on and this day, at the hour of 12, noon, at the front door of the court-house in the city or town of Coalville, in the county of Summit, in said Territory, sold at public auction, according to the statute in such case made and provided, to said Gust. Norquist, who was the highest bidder thereon, for the sum of two hundred and seventy-three and $\frac{26}{100}$ ($273.26,) which was the highest sum bid and whole price paid for the same.

All the right, title, interest, claim and estate which the Wasatch Mining Company held on the 2nd day of January, A. D. 1877, or may have since acquired of, in or to the following-described mining property, to wit: the Walker and Walker Extension and Buckey mines, lode or lodes, situated in Uintah mining district, county of Summit and Territory of Utah, for particular description of which see U. S. patents of the Walker and Walker Extension and Buckey mines, recorded on pages 24, 25, 26, 33, and 34 of Book "E" of
45 Records of Deeds, in the recorder's office of Summit county, Utah Territory, together with all and singular, the tenements and hereditaments and appurtenances thereunto belonging or in anywise appertaining.

And I further certify that said property was sold in one parcel and is subject to redemption pursuant to the statute in such case made and provided.

Given under my hand this 17th day of March, A. D. 1877.

WILLIAM NELSON,
U. S. Marshal,
By J. FRED. CORKER, *Deputy*.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss*:

N. W. Clayton being duly sworn, says: I am an officer, namely, secretary of the defendant corporation.

I have read the foregoing answer and know the contents thereof,

and that the same is true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

NEPHI W. CLAYTON,
Secretary Wasatch Mining Company.

Subscribed and sworn to before me this 23rd day of February, 1887.

[SEAL.] MARLOW L. CUMMINGS,
Notary Public, Salt Lake County, Utah Territory.

Service admitted of this answer February 23rd, 1887.

E. T. SPRAGUE,
Plaintiff's Attorney.

Filed February 23rd, 1887.

J. M. ZANE, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

46 In the District Court of the Third Judicial District of Utah Territory.

THE CRESCENT MINING COMPANY
vs.
THE WASATCH MINING COMPANY.

EXHIBIT C.

This action having been heretofore tried by the court sitting without a jury, the evidence and argument of counsel having been heard and considered, this court makes certificates and files therein the following:

Findings of Fact.

In July, 1886, said plaintiff contracted to buy of defendant, and defendant agreed to sell to plaintiff for a valuable consideration, the following-described mining property and premises situated in Uintah mining district, Summit county, Utah Territor-, bounded with magnetic variation at 17 degrees and 20 minutes east, as follows, to wit: Beginning at corner No. 1 of the Walker and Walker Extension mine and running thence at 44 deg. 35 min. W. 220 feet to corner No. 2 of said mine, from which U. S. mineral monument No. 4 bears S. 46 deg. 10 min. W. at a distance of 158 feet, thence S. 21 deg. 15 min. W. 196 feet to corner No. 3, thence S. 68 deg. 05 min. W. 2,804 feet to corner No. 4, thence S. 44 deg. 35 min. E. 216 feet to corner No. 5, thence N. 68 deg. 05 min. E. 1,410 feet to corner No. 3 of the Buckey mine; thence S. 44 deg. 35 min. E. along the southerly end line of said Buckey mine 130 feet to corner No. 4 thereof, thence 68 deg. 05 min. E. 1,400 feet to corner No. 1 of said last-mentioned mine, thence N. 44 deg. 35 min. W. 130 feet to corner No. 2 of said Buckey mine, the same being also corner No. 6 of said
47 Walker and Walker Extention mine, thence N. 21 deg. 15 min. E. 190 feet to the place of beginning, together with all

dips, spurs and angles and also all metals, ores, gold and silver bearing quartz rocks and earth therein, and all the rights, privileges and franchises thereto incident, appendant or appurtenant or therewith usually had and enjoyed, and all the estate, right, title, interest, property, possession, claim and demand of said party defendant in or to the same.

2. In pursuance of said contract a deed was made by defendant to plaintiff bearing date September 1st, 1886, wherein and whereby mistake and inadvertance, in describing the property so contracted for and to be deeded, there was omitted therefrom so much of said property and premises as had been patented by the United States to James Lowe, and others, as part of lot 42, called the Pinyon and Pinyon Extension mining claim.

3. That in making said contract and said deed it was the intention of parties plaintiff and defendant to include the premises and property omitted as last aforesaid, and the purchase price thereof was paid and secured with that of the property deeded.

Conclusions of Law.

1. Plaintiff is entitled to have its deed from defendant a deed so reformed as to embrace and include in its description of the property to be conveyed, all that which is described in the first above finding of fact.

Let judgment and decree be entered accordingly.

Dated July 30, 1887.

C. S. ZANE, *Judge.*

(Endorsed:) Title of court and cause. Findings filed July 30, 1887. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

48 District Court of Third Judicial District of Utah Territory.

THE CRESCENT MINING COMPANY, Plaintiff,
vs.
THE WASATCH MINING COMPANY, Defendant.

EXHIBIT D.

This cause having been tried by the court sitting without a jury, and findings of fact and conclusions of law having been duly made and filed, whereby it appears in substance that said plaintiff is entitled to the relief demanded in the complaint, now, on motion of P. L. Williams and E. T. Sprague, attorneys of plaintiff, and by virtue of the law and the premises, it is hereby ordered, adjudged and decreed, that defendant forthwith on demand therefor execute and deliver to said plaintiff a deed granting and conveying to plaintiff the following-described mining property and premises, situated in Uintah mining district, Summit county, Utah Territory, bounded with magnetic variations at 17 degrees and 20 minutes east, as follows, to wit: Beginning at corner No. 1 of the Walker and Walker Extension mine and running thence at 44 deg. 35 min. W. 220 feet

to corner No. 2 of said mine, from which U. S. mineral monument No. 4 bears S. 46 deg. 10 min. W. at a distance of 158 feet; thence S. 21 deg. 15 min. W. 196 feet, to corner No. 3, thence S. 68 deg. 05 min. W. 2,804 feet to corner No. 4, thence S. 44 deg. 35 min. E. 216 feet to corner No. 5, thence N. 68 deg. 05 min. E. 1,410 feet to corner No. 3 of the Buckey mine; thence S. 44 deg. 35 min. E. along the southerly end line of the said Buckey mine 130 feet to
49 corner No. 4 thereof; thence N. 68 deg. 05 min. E. 1,400 feet to corner No. 1 of said last-mentioned mine; thence N. 44 deg. 35 min. W. 130 feet to corner No. 2 of said Buckey mine, the same being also corner No. 6 of said Walker and Walker Extension mine, thence N. 21 deg. 15 min. E. 190 feet to the place of beginning, together with all dips, spurs and angles, and also all metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant or appurtenant, or therewith usually had and enjoyed and all the estate, right, title and interest and property, possession, claim, and demand of said party defendant in or to the same.

That until and in default of such conveyance all the right, title and interest of said defendant in or to the property last aforesaid held on the 3rd day of January, 1887, or since acquired by defendant be and hereby is vested in and adjudged to be owned and possessed by said plaintiff, and the title thereto is hereby confirmed and quieted in said plaintiff, further that plaintiff have and recover of and from defendant the sum of one hundred ninety-one and $\frac{80}{100}$ dollars cost.

Dated July 30th, 1887.

C. S. ZANE, *Judge.*

Attest:
[SEAL.]

J. M. ZANE, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

Filed July 30th, 1887.

J. M. ZANE, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

50 In the District Court of the Third Judicial District of Utah Territory.

THE CRESCENT MINING COMPANY, Plaintiff,
vs.
THE WASATCH MINING COMPANY, Defendant.

EXHIBIT E.

To the above-named plaintiff and to Messrs. Baskin, Sprague and Williams, its attorneys:

Please take notice that the defendant above named hereby appeals to the supreme court of Utah Territory from the judgment herein entered on the 30th day of July, 1887, in said court, in favor of

plaintiff and against the said defendant, and from the whole thereof, and also from the order of said court made on the 7th day of February, 1888, overruling said defendant's mention for a new trial herein.

Dated March 24th, 1888.

W. H. DICKSON,
BENNETT, KIRKPATRICK & BRADLEY,
Attorneys for Defendant.

Notice of appeal.
Filed March 26, 1888.

HENRY G. McMILLAN, *Clerk.*

51 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

EXHIBIT F.

I, Henry G. McMillan, clerk of the district court for the third judicial district of Utah Territory, do hereby certify that on March 28, 1888, the Wasatch Mining Company deposited with me a deed duly executed by it to the Crescent Mining Company for the grievances in controversy in the suit of the Crescent Mining Company against Wasatch Mining Company, and same is now in my possession.

Witness my hand and the seal of said court this 12th day of August, 1889.

[SEAL.] HENRY G. McMILLAN, *Clerk.*

In the District Court for the Third Judicial District, Utah Territory.

THE WASATCH MINING COMPANY, Plaintiff, }
vs.
THE CRESCENT MINING COMPANY, Defendant. }

The said plaintiff complains of said defendant and alleges:

I. That said plaintiff and said defendant are and at all times hereinafter mentioned were and still are, respectively, corporations organized under the laws of Utah Territory, as mining corporations, and authorized as such to own, buy and sell mining property.

52 II. That on or about the first day of September, 1886, said plaintiff sold and conveyed to said defendant, and said defendant purchased and received from said plaintiff a conveyance of the Walker and Walker Extension and the Buckey mining claims, situate in Uintah mining district, Summit county, Utah Territory. That to secure the payment of the purchase-money, forty-two thousand five hundred dollars, which the defendant agreed to pay for said property, said defendant made, executed and delivered to said plaintiff a mortgage bearing date on the first day of September, 1886, and which appears to have been acknowledged according to law on the fourth day of October, 1886; which said mortgage recites the circumstances under which said sale and purchase were made, the terms thereof, and the amount of the purchase-money to be paid.

It was the intention of both parties to include in said mortgage the entire property purchased, and other property. That a true copy of said mortgage with the certificates of acknowledgment and of record endorsed thereon or annexed thereto, is annexed to and made part of this complaint, and marked Exhibit A.

III. That the sole value of said mortgaged properties is in the ore deposits therein, and when they have been worked out the property will be worthless; that on the defendant's receipt of plaintiff's conveyance of said properties said defendants entered into possession of the said Walker and Walker Extension and Buckey mining claims, and have ever since been engaged in extracting and converting to its own use the ores found therein; that said defendant is now engaged and threatens to continue to be engaged in extracting said ores.

IV. That no part of said mortgage debt has been paid; that the action relative to the title mentioned in said mortgage is still
53 pending and undetermined; that no direction has been made or given by all the parties to said action how payment of said mortgage debt shall be made, and therefore the condition of said mortgage requiring the mortgagor to pay the mortgage debt into this court is operative, and such payment is now due.

V That the mortgage property is a slender security for said mortgage debt. That as plaintiff is informed and believes the mining claims mentioned in said mortgage, other than the said property so purchased by said defendant from said plaintiff, have been worked out and exhausted of their ores, which gave them their sole value. And that the other property mentioned in said mortgage, viz: the tramway and concentrating mill, are valuable only in connection with said mortgaged premises, and will be of trifling value when said premises yield no more ore; that in such connection, and while so used, their value does not exceed, as plaintiff is informed and believes, the sum of —— dollars. That a reasonable attorney's fee for foreclosure of said mortgage is five per cent. reckoned on the mortgage debt.

Therefore said plaintiff prays for relief and judgment as follows:

1. That said defendant and its agents and servants be enjoined from working or mining in the mortgaged premises or extracting and removing therefrom any ores. And that a receiver be appointed with the usual powers to take charge of said mortgaged premises during the pendency of this action.

2. That the amount of the mortgage debt be ascertained and adjudged to include principal 42,500 and interest after maturity at the rate of ten per cent. per annum, together with five per cent. for reasonable attorney's fee stipulated for in said mortgage, and that the usual decree of foreclosure may be made, and that the mortgaged premises be sold according to law, and the pro-
54 ceeds of such sale be applied to pay the costs, and said mortgage, and that said plaintiff may have such other or further relief or judgment as shall be equitable.

J. G. SUTHERLAND,
W. H. DICKSON,
Plaintiff's Attorney-.

UTAH TERRITORY, } ss:
Salt Lake County, }

Nephi W. Clayton being duly sworn says, I am an officer of the corporation named as plaintiff in the foregoing complaint, viz: a trustee and secretary. I have heard read the said complaint and know its contents. Said complaint is true of my own knowledge except the matters which are therein stated on information or belief, and as to such matters I believe it to be true.

NEPHI W. CLAYTON.

Sworn to and subscribed before me this 30th day of October, 1888.

[SEAL.] J. G. SUTHERLAND,
Notary Public.

EXHIBIT A.

This indenture made this first day of September, in the year one thousand eight hundred and eighty-six, between the Crescent Mining Company, a corporation organized under the laws of Utah Territory, party of the first part, and the Wasatch Mining Company, a corporation organized under the laws of said Territory, party of the second part, witnesseth:

Whereas, said first party heretofore made a contract with William Jennings, Joseph A. and Isaac Jennings for the purchase from them as owners of those certain patented mining claims, situate in Summit county, Territory of Utah, called and patented by the name of the "Walker and Walker Extension" and "Bucky" mining claims, for the sum of fifty thousand dollars, and paid on the purchase-money to said vendors the sum of seven thousand five hundred dollars, receiving then as part of said purchase fifteen hundred shares of the capital stock of said Wasatch Mining Company.

And, whereas, said second party, claiming to be the owner of said properties, heretofore brought suit against said William Jennings, Joseph A. Jennings and Isaac Jennings in the district court of the third judicial district of Utah Territory, for the recovery thereof, which suit is still pending against said Isaac Jennings, Joseph A. Jennings and the representatives of said William Jennings, now deceased.

And whereas, said second party has conveyed all its right, title and interest in and to said properties to said first party, pursuant to an agreement heretofore made with said second party for the sum of forty-two thousand five hundred dollars, the said first party agreeing that the fifteen hundred shares of the capital stock of the said Wasatch Mining Company should not participate in the distribution of said forty-two thousand five hundred dollars, nor derive any benefit therefrom.

Now, therefore, the said party of the first part, in consideration of the premises, and the sum of forty-two thousand five hundred dollars, hath granted, sold and conveyed, and by these presents, doth

sell, grant and convey unto said party of the second part, its successors and assigns forever, its group of mining claims situate in Uintah mining district, Summit county, Utah Territory, bearing the following names: to wit: The Pinyon and Pinyon Extension mining claims, except 2.55 acres heretofore conveyed away, the Re-
56 bellion, the Hecla, the Ætna, the Tidal Wave, the Malkahy, the Shamas O'Brien, the Climax, the James A. Garfield, the Samuel, the Bible Back, the Senate and the Fallon mining claims; and, also, the said Walker and Walker Extension and the Buckey mines and mining claims, also, the Crescent tramway from said mines to Park City, with all the equipment thereof, belonging to the said first party, also the concentrating mill and land and improvements connected therewith at said Park City, and including the vein, veins or lodes, and all the mineral-bearing rock and ores in said mining claims or thereto pertaining, and also all the tenements, hereditaments and ap-urtenances thereto belonging; to have and to hold the said several properties with the veins, lodes, minerals, ores and appurtenances aforesaid, unto the said party of the second part and to its successors and assigns forever.

This conveyance is intended as a mortgage to secure the payment of forty-two thousand five hundred dollars in one year from the date hereof, which said first party agrees to pay at the time aforesaid; and said payment shall be made as follows, to wit: Absolutely, to said party of the second part, its successors or assigns, if at said time, said suit shall have been finally determined in favor of said second party, and its title to said Walker and Walker Extension and Buckey mining claim maintained and established, and the same is free of all incumbrances made or suffered by said party of the second part; or, if said action is still pending at the end of a year from date, and all the parties thereto direct how such payment may be made, it shall be made accordingly; but if the action is then pending and undetermined, and no direction given by all the parties thereto, then and in that case, payment shall be made of said principal into said court in said action, recognized by order thereof, to be disposed of
57 as follows: To be paid to said second party, its successors or assigns, on the final determination of said action in favor of said plaintiff and confirmation of its title to said last-mentioned property, the same being free of all incumbrances made or suffered by said second party; and subject to be repaid to said first party, on its request, or on its order, if said action be finally, and on its merits, determined adversely to said second party on its claim of title to said last-mentioned property. And on payment being made, as aforesaid, of said sum of forty-two thousand five hundred dollars, as aforesaid, then these premises shall be void.

And in case default shall be made in the payment of said principal, or any part thereof, then the said party of the second part, its successor or assigns, are hereby authorized and empowered to sell the said premises, or any part thereof, in the manner prescribed by law, and out of the moneys arising from such sale, to retain and pay the said principal, together with all costs and charges of making such sale, and a reasonable attorney's fee for foreclosure or collection, and

the overplus, if any there be, shall be paid by the party making such sale on demand, to said party of the first part, its successors or assigns.

In witness whereof, the said party of the first part has hereunto set and affixed its corporate name and seal, the day and year first above written.

CRESCENT MINING COMPANY,
By LEWIS H. WITHEY, *President.*

Signed, sealed and delivered in the presence of—
ANTON G. HODENPYL.
W. S. McCORNICK.

Attest:
[SEAL.] CHESTER H. WITHEY, *Secretary.*

58 STATE OF MICHIGAN, } ss:
County of Kent, }

On this fourth day of October, A. D. one thousand eight hundred and eighty-six, personally appeared before me, a notary public in and for said county, Lewis H. Withey, president of the Crescent Mining Company of Utah, personally known to me to be the person herein described and who executed the foregoing mortgage as said officer of the Crescent Mining Company described in said mortgage, who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes mentioned, as the act and deed of said Crescent Mining Company.

[SEAL.] ANTON G. HODENPYL,
Notary Public, Kent County, Michigan.

STATE OF MICHIGAN, } ss:
County of Kent, }

I, Cornelius L. Harvey, clerk of said county, (and *ex officio* clerk of the circuit court thereof, being a court of record, having common-law jurisdiction,) do hereby certify that Anton G. Hodenpyl, Esq., before whom the above and foregoing instrument appears to have been acknowledged, is and was, at the date of taking such acknowledgment, and the certifying thereof, a notary public within and for said county, duly commissioned, qualified and sworn, and authorized by the laws of said State to take such acknowledgment, and to certify the same; and I further certify that I sm acquainted with the handwriting of said Anton G. Hodenpyl and believe his signature appended to the above certificate of acknowledgment to be genuine; and that the said instrument is executed and acknowledged according to the laws of the State of Michigan.

59 In witness whereof, I have hereunto set my hand and official seal, at the city of Grand Rapids, this 4th day of October, A. D. one thousand eight hundred and eighty-six.

[SEAL.] CORNELIUS L. HARVEY, *Clerk,*
By FRANK P. CARPENTER, *Deputy.*

Recorded by request of Wasatch Mining Company, November 17th, 1886, in Book No. One of Mortgages, etc., pages 432–3–4 & 5.

JOHN BOYDEN,
Recorder, Summit County, Utah.

Filed October 30th, 1888.

In the District Court of the Third Judicial District of Utah Territory.

THE WASATCH MINING COMPANY, Plaintiff,
vs.
THE CRESCENT MINING COMPANY, Defendant.

Said defendant demurs to the complaint of the plaintiff in the above-entitled action, on the ground that said complaint does not state facts sufficient to constitute a cause of action, in this that it appears on said complaint, that the payment of the money secured by the mortgage therein mentioned into said court, was conditioned upon the making of an order by said court in a suit to
60 which this defendant is not a party, recognizing that said moneys should be disposed of as follows, to be paid to said plaintiff, its successors or assigns, on the final determination of the said action, described in said mortgage, in favor of said plaintiff, and confirmation of its title to the property in litigation therein, the same being free from all incumbrances made or suffered by said plaintiff, and subject to be repaid to this defendant, The Crescent Mining Company, on its request or on its order, if said action be finally on its merits determined adversely to said plaintiff on its claims of title to said property in litigation therein, and it nowhere appears that such order in said action has been made by said court, or sought for, or can be obtained by said plaintiff or this defendant, or both, nor does it appear that any notice of the obtaining or seeking to obtain, or of the ability or willingness to obtain, such order, has ever been given this defendant, or that any demand to make deposit or payment of said money in court pursuant to such order has ever been made on this defendant.

R. N. BASKIN,
E. T. SPRAGUE,
Defendant's Attorneys.

Filed November 26th, 1888.

WASATCH MINING COMPANY
vs.
CRESCENT MINING COMPANY.

This cause having been heretofore argued upon demurrer to the complaint and submitted to the court, and having been sufficiently considered by the court, is by the court overruled.

January 25th, 1889.

61 In the District Court of the Third Judicial District of Utah Territory.

THE WASATCH MINING COMPANY, Plaintiff,
vs.
THE CRESCENT MINING COMPANY, Defendant.

Now comes the defendant, The Crescent Mining Company, and in answer to the complaint herein, says that the facts relating to the conveyance of the Walker and Walker Extension and Buckey mining claims mentioned in said complaint, and the mortgage therein referred to, fully and accurately stated are as follows: The plaintiff being bound by a contract in writing with defendant, duly executed and delivered, bearing date July 9th, 1886, to convey to the defendant in consideration of $2,500 cash in hand paid by defendant to plaintiff, and $42,500 thereafter to be paid, upon certain conditions, the following premises, commonly called and known as the Walker and Walker Extension and Buckey mining claims, situated in Uintah mining district, Summit county, Utah Territory, described and bounded with magnetic variation of 17 degrees and 20 minutes east, as follows, to wit: Beginning at corner No. 1 of the Walker and Walker Extension mine and running thence N. 44 degrees 35 min. W. two hundred and twenty (220) feet to corner No. 2 of said mine, from which U. S. mineral monument No. 4 bears S. 46 deg. 10 min. W. at the distance of one hundred and fifty-eight (158) feet; thence S. 21 deg. 15 min. W. one hundred and ninety-six (196) feet to corner No. 3; thence S. 69 deg. 5 min
62 W. twenty-eight hundred and four (2,804) feet to corner No. 4; thence S. 44 deg. 35 min. E. two hundred and sixteen (216) feet to corner No. 5; thence N. 68 deg. 5 min. E., fourteen hundred and ten (1,410) feet to corner No. 3 of the Buckey mine: thence S. 44 deg. 35 min. E. along the southerly end line of said Buckey mine one hundred and thirty (130) feet to corner No. 4 thereof; thence N. 68 deg. 5 min. E. fourteen hundred (1,400) feet to corner No. 1 of said last-mentioned mine; thence N. 44 deg. 35 min. W. one hundred and thirty (130) feet to corner No. 2 of said Buckey mine, the same being also corner No. 6 of the said Walker and Walker Extension mines; thence N. 21 deg. and 15 min. E. one hundred and ninety (190) feet to the place of beginning.

On the 1st day of September, 1886, executed and delivered to defendant the deed of conveyance of the Walker and Walker Extension and Buckey mining claims mentioned in said complaint; that said deed of conveyance was executed and delivered in consideration of the contract of July 9th, 1886, for the purpose and with the intention of conveying to the defendant the mining premises before described in pursuance of the obligation of the plaintiff, under said contract to convey the same; that the preparation of the said deed was intrusted to an attorney of the plaintiff, who in drawing up the same, either inadvertently, fraudulently or by mistake, described the premises conveyed therein in general terms and so as not to include the whole of the property, which the plaintiff, was bound to convey under said contract, and which it was intended by the par-

ties thereto said deed should convey; that the portion of the said premises first described therein, omitted from and not conveyed by said deed is as follows, to wit:

Beginning at a corner No. 1 of the said Walker and Walker Extension mine, as the same was officially surveyed and pat-
63 ented, and running thence N. 44 deg. 35 min. W. one hundred and ninety (190) feet to intersection of westerly side line of lot No. 42, being the Pinyon and Pinyon Extension mine; thence S. 32 deg. W. 155 feet to intersection of northwesterly boundary line of said Walker and Walker Extension mines; thence S. 21 deg. and 15 min. W. along said boundary line 32 feet to corner No. 3 of said Walker and Walker Extension claim; thence S. 68 deg. 5 min. W. 10 feet to the intersection of the westerly side line of said lot No. 42; thence S. 32 deg. W. on said line, 510 feet, more or less, to intersection with the southerly boundary line of the Buckey mining claim; thence N. 68 deg. 5 min. E. along said last-mentioned line 339 feet to intersection of easterly boundary line of said lot No. 42; thence N. 32 deg. E. on said last-named boundary line 300 feet to intersection of the easterly boundary of said Walker and Walker Extension claim; thence on said boundary line of the last-named claim N. 21 deg. 15 min. E. 89 feet to said corner No. 1 the place of beginning.

That at the time said deed and mortgage were executed, as plaintiff well knew, the defendant was not aware of said omis-ion, but supposed and believed that said deed conveyed the premises herein first described, bargained for, as aforesaid under said written contract; that the said portion thus omitted in said deed is of thrice the value of the premises actually conveyed thereby, and the acquisition of its title was the main consideration which induced the action of the defendant in the premises; that the mortgage mentioned in said complaint was given solely to secure to plaintiff the payment of the balance of the purchase price of the premises herein first described remaining unpaid, and amounting to $42,500, under the belief and understanding that said deed of September 1st, 1886, actually conveyed said premises to defendant; that said defendant has never received from plaintiff the consideration for
64 which it executed said mortgage, but by reason of said omission in said deed of conveyance there has been a failure in consideration; said defendant further says that it did not discover the omission in said deed until about the 3rd day of January, 1887, and on that day it instituted a suit against plaintiff in this court for the purpose of reforming said deed so as to make it embrace and convey the premises herein first described, and such proceedings were therein afterwards had in this court that this court found as a conclusion of law from the findings of the facts in the case, that this defendant was entitled to have said deed reformed so as to have it embrace and include the premises herein first described, and by a decree in said case duly made and entered on July 30th, 1887, ordered the said plaintiff forthwith on demand therefor to execute and deliver to this defendant a deed granting and conveying said premises to it; that the plaintiff herein appealed to the supreme

court of Utah Territory from said decree, on the 24th of March, 1888; that said supreme court afterwards affirmed said decree, and said plaintiff made and filed a motion for rehearing, and the matter now rests and is pending in said supreme court, on said motion; that, upon said appeal, execution was stayed and said decree still remains unreserved and unexecuted, and plaintiff has never conveyed or offered to convey to the defendant the premises omitted as aforesaid.

Said defendant further answering, denies that plaintiff ever sold to the defendant, or that the defendant ever purchased of plaintiff, any mining claims or any other property whatever except the premises herein first described; denies that it ever agreed to pay for the mining claims mentioned in the complaint the sum of $42,500 or any sum whatever; denies that the mortgage referred to in the complaint accurately recites the circumstances under
65 which said alleged sale and purchase were made, or the terms thereof or the amount of the purchase-money to be paid, but upon the contrary, the recitations of said mortgage relate solely to the sale and purchase of the premises herein first described and intended by the parties to be conveyed by the deed of September 1st, 1886; said defendant denies that the sole value of the mortgaged properties is in the ore deposited therein, or that when they have been worked out the property will be worthless; denies that the conditions of said mortgage requiring mortgagor to pay the mortgage debt into this court is operative or that such payment is now due or will become due until the plaintiff corrects the omission of said deed by conveying to the defendant the premises so as aforesaid purchased by it, denies that the mining claims mentioned in said mortgage other than the said property (alleged in the complaint) to have been purchased by the defendant from the plaintiff have been worked out or exhausted of their ores. On the contrary said defendant says that said claims contain large and valuable quantities of ores, and are of sufficient value alone to amply secure a much larger sum than $42,500; denies that the tramway and concentrating mill are valuable only in connection with said mortgaged premises or will be of trifling value when said premises yield no more ore; on the contrary said defendant says the said tramway and concentrating mill, independent of any such connection, are of great intrinsic value, being worth more than $20,000, and in connection with said premises are worth $50,000; said defendant further denies that five per cent. of the mortgaged debt is a reasonable attorney's fee in the premises; on the contrary, says that it is unreasonable and $1,000 would be a reasonable fee in the premises. Said defendant further answering says, that the proper working and development of the mortgaged min-
66 ing claims, necessarily required deep explorations and the erection of costly machinery, hoisting works and pumping apparatus; that since said defendant so purchased the premises herein first described it has necessarily expended in the purchase and erection of such machinery, hoisting works and pumping apparatus, over $40,000, on the mortgaged mining claims, and a large

additional sum in sinking a main working shaft to the deep on the vein in said claims, and developing and opening up said vein therefrom, and that the same has so increased the value of said claims, that the same to-day are worth more than double what they were at the date of said purchase; that said mortgaged property is amply sufficient in value to secure more than four times the amount of the balance of the purchase-money $42,000; that said defendant is still continuing said developments and the value of said claims is being daily increased thereby; that said claims as at present developed and worked and as the defendant intends to continue to work the same in the future, cannot be exhausted of its ores so as to impair materially the security of plaintiff under said mortgage in ten years; that aside from the consideration of the ore deposits in said mining claims, the property mortgaged is in value ample to secure the plaintiff's claim.

Said defendant further says that it is not a party to said action against William Jennings, *et al.*, mentioned in said complaint, therefore has no right or power to appear in said case, and procure the order of the court specified in said mortgage, recognizing accepting or permitting said deposit to be made in this court, and the plaintiff has not procured any such order or taken any steps in regard thereto or notified the defendant to appear in said court at any time to make such deposit under such order either made or to be applied for.

67 Said defendant prays judgment for such an order and relief as equity in the premises may require.

R. N. BASKIN & E. T. SPRAGUE,
Defendant's Attorney-.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Joshua R. Nichols, being duly sworn says, I am vice-president and director of the corporation defendant named in the foregoing answer. I have read said answer and know its contents, and the same is true of my own knowledge except as to the matters therein stated on information and belief, and as to those matters I believe it to — true.

Subscribed and sworn to before me this 26th day of November, 1888.

E. A. KAHLER,
Notary Public.

Filed November 26th, 1888.

In the District Court of the Third Judicial District of the Territory of Utah.

THE WASATCH MINING COMPANY, Plaintiff,
vs.
THE CRESCENT MINING COMPANY, Defendant.

This cause having been heretofore regularly brought on for trial before the court sitting without a jury (the Hon. Thomas J

68 Anderson, judge, presiding) J. G. Sutherland and W. H. Dickson appeared as attorneys for the plaintiff and R. N. Baskin, Esquire, and Messrs. Zane & Zane appeared as attorneys for the defendant, and the court having heard the proofs of the respective parties, and considered the same and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been duly submitted to the court for its decision thereon, now the court being fully advised, finds the following facts:

1st. That on, to wit, September 1st, 1886, the plaintiff sold to defendant, and defendant purchased from plaintiff, certain mining ground and premises, situated in Uintah mining district, Summit county, Utah Territory, and thereupon plaintiff executed and delivered to defendant a conveyance, claimed by the plaintiff to be a conveyance of all the mining ground and premises so sold by plaintiff and purchased by defendant, which conveyance was afterwards reformed by the decree of this court, as hereinafter found, in a certain action wherein the defendant herein was plaintiff and the plaintiff herein was defendant.

2nd. That to secure the payment of the purchase-money of the mining ground and premises so sold by plaintiff and purchased by the defendant, to wit, forty-two thousand five hundred ($42,500) dollars, which said defendant agreed to pay for said property, said defendant made, executed and delivered to said plaintiff its, said defendant's mortgage, bearing date the 1st day of September, A. D. 1886, a true copy of which said mortgage is annexed to the complaint in this action. That the time and manner in which payment of said purchase-money was to be made, according to the agreement and understanding of said parties, are truly set forth in said mortgage.

3d. That on the execution and delivery of said conveyance
69 and said mortgage said defendant entered into and took possession of all said mining ground and premises, including the portion secondly described in said answer, and has ever since been engaged in mining, extracting and converting to its own use the metals and ore therein contained. That said defendant still holds the exclusive possession of all said mining ground and premises, is still engaged in said work of mining, extracting and converting to its own use the ores and metals contained therein, and that said property is valuable only for the ores found therein.

4th. That no part of said mortgage debt, or any interest thereon has ever been paid.

5th. That the action relative to the title to the property so sold to defendant by plaintiffs, mentioned and referred to in said mortgage, namely: The action brought by the plaintiff herein against William Jennings, Joseph A. Jennings and Isaac Jennings, is still pending and undetermined, and the parties to said action have never made or given any direction as to how payment of said mortgage debt shall be paid, nor has the same or any part thereof been paid into this court in said action in any manner or at all.

6th. That on the 3d day of January, A. D. 1887, the defendant

herein commenced an action in this court against the plaintiff herein to compel a reformation of said conveyance from said plaintiff to said defendant so as to make said conveyance embrace and include all the ground and premises first described in the answer herein, alleging and claiming in said action that said conveyance should, according to the contract between the parties thereto, have embraced all said ground and premises, but that the same had been by defendant in said action, the plaintiff herein, so drawn as to fraudulently omit therefrom all that portion of said ground and premises secondly described in the answer herein, and such
70 proceeding- were afterwards had therein in this court that this court found as a conclusion of law, from the findings of fact in the case, that the said defendant herein, plaintiff therein, was entitled to have said conveyance so referred, and by its decision said action duly made and entered on the 30th day of July, A. D. 1887, ordered the defendant therein, plaintiff herein, forthwith on demand therefor to execute and deliver to the plaintiff therein, defendant herein, a deed granting and conveying to it all the ground and premises secondly described in the answer herein. Further provision in said decree was in the words and figures following, to wit: "That until and in default of such conveyance" (meaning the conveyance so described by said decree to be given as aforesaid) "all the rights, title, and interest of said defendant in and to the property last aforesaid" (meaning the property secondly described in the answer herein) "held on the 3d day of January, 1887, or since acquired by defendant, be, and hereby is, vested in and adjudged to be owned and possessed by said plaintiff, and the title thereto is hereby confirmed and quieted in said plaintiff."

7th. That the defendant therein, plaintiff herein, on the 24th of March, 1888, appealed from the decree, mentioned in the last finding, to the supreme court of Utah Territory, and, in order to stay the execution of said decree, pending said appeal, executed and deposited with the clerk of this court, to abide the judgment of the said appellate court, the deed directed by said decree, as aforesaid, to be executed and delivered by the defendant to the plaintiff, as by the statute in such case provided, and that said deed is still held by said clerk subject to the judgment of said appellate court—the same never having been called for by the defendant herein.

8th. That said supreme court affirmed said decree on the
71 27th day of August, 1888, and thereafter the plaintiff herein made and filed in said supreme court a motion for rehearing.

9th. From evidence introduced herein on the part of the defendant the court finds that the motion for rehearing, mentioned in the 8th finding of fact, was by said supreme court denied on the seventh day of January, 1889, and that therefore said defendant therein gave notice of an appeal, and asked that said appeal be allowed, and the same was allowed by the said supreme court to the Supreme Court of the United States, and the matter now rests, and is pending upon said appeal.

10th. The court finds that the sum of one thousand ($1,000) dol-

lars is a reasonable counsel fee to be paid plaintiff's attorneys herein, by said defendant.

11th. The court finds that all the material allegations of said complaint herein, not covered by the foregoing findings, are true, and all material allegations of the answer herein, not covered by the foregoing findings, are untrue.

As conclusions of law from the foregoing facts, the court now hereby finds and decides:

1st. That said plaintiff is entitled to have said mortgage debt, $42,500, paid into this court in said action mentioned in the 5th finding of fact herein, as provided by the terms of said mortgage, together with interest thereon at 10 per cent. per annum from the 1st day of September, 1887, until the same shall have been so paid into court.

2nd. That plaintiff is entitled to have and recover from said defendant its costs herein, including $1,000 as and for attorneys' fees.

3d. That plaintiff is entitled to a decree foreclosing said mortgage and directing a sale according to law of the premises embraced and covered by said mortgage, and to have the proceeds of such sale or so much thereof as may be necessary for that purpose, ap-
72 plied to the payment of said costs and attorneys' fees, and to the payment into this court as aforesaid of said $42,500 with interest thereon as aforesaid.

Dated this — day of July, 1889.

T. J. ANDERSON,
Presiding Judge of said Court at the Trial of said Action.

Filed July 30th, 1889.

In District Court, Third Judicial District of Utah Territory.

WASATCH MINING COMPANY *vs.* CRESCENT MINING COMPANY. } Amendments to Findings Proposed.

1. At end of line 26 on page 4 insert: That the value of the premises secondly described in the answer herein was much greater than that of the premises actually conveyed, being two-thirds of the value of the whole of the premises intended to be conveyed and the acquisition of title to which was the main inducement for the purchase of said premises.

2nd. At end of line 26, on page 3, insert: That the defendant since taking possession of the property aforesaid has expended large sums in improvements thereon.

3rd. At end of line 16, on page 6, insert: That thereupon said defendant therein gave notice of an appeal and asked that the said appeal be allowed, and the same was allowed by the said supreme court to the Supreme Court of the United States, and the matter now rests and is pending upon said appeal.

73 4th. Strike out the 11th finding on page 6 and insert: That the defendant is not a party to the suit of the Wasatch Mining

Company *vs.* Jennings, *et al.*, mentioned above, and has no right or power to appeal therein and procure any order for the deposit of money, mentioned in the mortgage, and that plaintiff has not procured any such order to be made or taken any steps in regard thereto, or notified the defendant to appear in said court at any time, to make such deposit under such order, either made or to be applied for.

5th. On page 1, line 29, strike out beginning with "claimed" to word "which" on line 32.

6th. On page 6, line 11, strike out beginning with "from" to the word "that" on line 12.

7th. In the conclusions of law strike out on page 7, line 3, beginning with "together" to the word "court," on line 7.

8th. The third conclusion should contain a provision that unless the money is paid the premises shall be sold.

9th. The decree should conform to these findings.

R. N. BASKIN AND
JNO. M. ZANE,
For Defendant.

Filed July 30, 1889.

74 In the Third Judicial District Court of Utah Territory.

THE WASATCH MINING COMPANY, Plaintiff,
vs.
THE CRESCENT MINING COMPANY, Defendant.

This cause having been regularly brought in to be heard (Hon. T. J. Anderson, judge, regularly presiding), upon the complaint of the above-named plaintiff and the answer thereto of defendant, and the court having heard the proof of the respective parties and having duly considered the same and the records and papers in said cause and the arguments of the counsel of the respective parties, and it appearing to the court from said proof and the records and papers in said cause that the plaintiff is entitled to have the defendant pay the principal sum or debt mentioned and secured in the mortgage, a copy whereof is annexed to said complaint, namely, $42,500, into this court in a certain action pending in said court wherein the plaintiff herein is plaintiff therein, and wherein Joseph A. Jennings, *et al.*, are defendants, being file No. 5369 of records of cases in this court to be recognized by order of this court in said action to be disposed of as follows: To be paid to the plaintiff on the final determination of said action in favor of said plaintiff and confirmation of its title to the property the title to which is involved in said action, the same being then free of all incumbrances made or suffered by the plaintiff and subject to be repaid to the defendant herein,

75 on its request or on its order, if said action be finally and on its merits determined adversely to said plaintiff on its claim of title to the property the title to which is involved in said action, as provided by the terms of said mortgage; and is also entitled to have said defendant pay into this court in said action, sub-

ject to a like order as to the disposition thereof, interest on said sum of $42,500 at the rate of ten per cent. per annum from the first day of September, 1887, until said principal sum shall have been as aforesaid paid into court, said interest amounting at the date thereof to the sum of $7,967. And that all the material allegations in the said complaint are true; now on motion of plaintiff's attorneys:

It is adjudged and decreed that all and singular the mortgaged premises mentioned in said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount of said principal sum or debt and interest thereon as aforesaid and the costs and attorneys' fees in the suit as herein specified and the expense of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of the United States marshal of Utah Territory, at the courthouse of Summit county, in Utah Territory, in which said county said premises are situated. That said marshal give public notice of the time and place of such sale, according to the course and practice of the court and the laws relative to sales of real estate under execution. And that the plaintiff or any of the parties to this suit may become the purchaser at such sale; and that the marshal, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale, if the same has not been redeemed. That the marshal, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale and pay to the plaintiff or its attorney
76 out of said proceeds, its costs in this suit taxed at $50.00 and the sum of one thousand ($1,000) dollars allowed by the court as counsel fee of foreclosure, with interest thereon from this date at the rate of ten per cent. per annum. And that said marshal pay the balance of the proceeds of such sale, or so much thereof as may be necessary to make said principal sum of $42,500 with interest thereon as aforesaid, into this court in said action wherein the plaintiff herein is plaintiff and Joseph A. Jennings, *et al.*, are defendants, being file No. 5362 of records of cases in this court, to be recognized by order of this court in said action as aforesaid. That the defendant and all persons claiming or to claim under it be forever barred and foreclosed of and from all equity of redemption and claim in, of and to said mortgaged premises, and every part and parcel thereof, from and after the delivering of the said marshal's deed.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage referred to, or from the complaint filed in this action, are as follows, to wit: All that certain group of mining claims, situated in the Uintah mining district, Summit county, Utah Territory, bearing the following names, to wit: The Pinyon and Pinyon Extension mining claims, except 2.55 acres thereof sold prior to the 1st of September, 1886, the Rebellion, the Hecla, the Ætna, the Tidal Wave, the Malkahy, the Shamas O'Brien, the Climax, the James A. Garfield, the Samuel, the Bible Back, the Senate, and the Fallon mining claims, also the Walker

and Walker Extension and Buckey mining claims, also the Crescent tramway from the said mines to Park City, in said county, with all the equipments thereof belonging to said defendant also the concentrating mill and land and improvements connected there-
77 with, situate at said Park City, and belonging to said defendant, including the vein, veins or lodes and all the mineral-bearing rock and ores in said mining claims or thereto pertaining, and also all the tenements, hereditaments and appurtenances thereto belonging.

Dated July 30th, 1889.

T. J. ANDERSON,
Judge Presiding at the Trial of said Action.

Attest:
[SEAL.] HENRY G. McMILLAN, *Clerk.*

Filed July 30th, 1889.

In the District Court of the Third Judicial District of Utah Territory, Salt Lake County.

WASATCH MINING COMPANY, Plaintiff,
vs.
CRESCENT MINING COMPANY, Defendant. } Notice of Motion for New Trial.

To William H. Dickson and Jabez G. Sutherland, Esquires, attorneys for the plaintiff:

You will please take notice that the defendant hereby gives notice that it moves the court to grant a new trial herein by a motion of copy of which is served herewith. The said motion will be made upon the following grounds, to wit:

1. That the court erred in overruling the demurrer to the plaintiff's complaint herein.

78 2. That the court erred in making the findings of fact and conclusions of law herein, because the evidence is insufficient to justify said findings in this:

(A.) The evidence shows that the property mentioned in said findings is valuable for other things than only the ores found therein.

(B.) The evidence fails to show that there is any mortgage debt.

(C.) The evidence shows that all the material allegations of the answer are true.

(D.) The evidence shows that the value of the premises omitted from the deed of the Wasatch Co. to the Crescent Co. was three times as great as the premises included in said deed, and constituted the only inducement for defendant to purchase, and that said premises omitted were omitted by mistake of the parties to the deed.

(E.) The evidence shows that the defendant is not a party to the suit of The Wasatch Mining Co. *vs.* Jennings, *et al.*, and had no right or power to procure an order for payment of money into court in said cause, and that plaintiff has not procured or attempted to procure

any such order to be made, and has never taken any steps therefor, or notified defendant to have such order made, or to make said deposit with the clerk of this court.

(F.) The evidence shows that there is no debt due at this time or ever was to the Wasatch Mining Company or any other corporation or to any person, and that the figuring of interest to be paid on the sum mentioned in the mortgage, is contrary to the evidence.

(G.) The evidence shows that no foreclosure can be had in this cause, and therefore the allowance of attorney's fees is contrary to the evidence.

3. That the court erred in the conclusions of law made
79 herein, because the same are not the legal result either of the findings or evidence, and in entering decree in accordance with the conclusions of law.

The said motion will be made upon the record in the case and the statement presented herewith.

Dated August 26th, A. D. 1889.

BASKIN & VAN HORNE &
JOHN M. ZANE,
Attorneys for Defendant.

In the District Court of the Third Judicial District of Utah Territory, Salt Lake County.

WASATCH MINING COMPANY, Plaintiff,
vs.
CRESCENT MINING COMPANY, Defendant. } Motion for New Trial.

Now comes the defendant herein and moves the court to grant a new trial herein on account of various errors set forth in the notice of this motion.

BASKIN & VAN HORNE AND
JNO. M. ZANE,
Attorneys for Defendant.

Filed August 27th, 1889.

80 In Third District Court of Utah Territory.

WASATCH MINING COMPANY
vs.
CRESCENT MINING COMPANY.

The motion of defendant for new trial herein having been argued by counsel and submitted to the court and the court having now fully considered the motion and questions raised, and it appearing to the court that the judgment and decree herein are fully sustained by the law and the testimony and no sufficient reason having been shown to warrant the allowance of a new trial herein, it is ordered and adjudged that said motion for a new trial herein be and the same is hereby overruled. To which ruling and order defendant by its attorney except.

Dated May 3d, 1890.

In the District Court of the Third Judicial District of Utah Territory, Salt Lake County.

WASATCH MINING COMPANY, Plaintiff,
vs.
CRESCENT MINING COMPANY, Defendant. } Notice of Appeal.

To Messrs. J. G. Sutherland and W. H. Dickson, attorneys for said plaintiff, and to said plaintiff and the clerk of said court:

You will please take notice that the defendant above named
81 hereby appeals to the supreme court of said Territory from the judgment and decree herein made and entered in said court in favor of said plaintiff and against said defendant, on the 30th day of July, 1889, and from the whole thereof, and from the order made in said cause on the 3d day of May, 1890, overruling said defendant's motion for a new trial herein.

Dated this May 21st, 1890.

BASKIN & VAN HORNE &
JOHN M. ZANE,
Attorneys for Defendant.

Filed May 21st, 1890.

In the District Court of the Third Judicial District of Utah Territory, Salt Lake County.

WASATCH MINING COMPANY, Plaintiff,
vs.
CRESCENT MINING COMPANY, Defendant. } Undertaking.

Whereas, the defendant above named, a corporation, is about to appeal to the supreme court of the Territory of Utah from the judgment and decree in favor of said plaintiff and against said defendant, made and entered herein on the 30th day of July, A. D. 1889, and from the whole thereof and from the order overruling defendant's motion for a new trial herein made and entered on the 3d day of May, 1890, now, therefore, in consideration of the premises and of said appeal, we, James McGregor, of Salt Lake City,
82 and W. S. McCornick, of Salt Lake City, hereby jointly and severally undertake and promise on the part of appellant, that it will pay all costs and damages that may be awarded against it on said appeal or on a dismissal thereof, not exceeding the sum of three hundred dollars, and for the payment of said sum well and truly to be made we acknowledge ourselves jointly and severally bound.

Witness our hands and seals this 22nd day of May, 1890.

JAMES McGREGOR. [SEAL.]
W. S. McCORNICK. [SEAL.]

TERRITORY OF UTAH, } ss:
County of Salt Lake,

James McGregor and W. S. McCornick, the sureties on the foregoing undertaking, being duly sworn, each for himself, says that

he is a resident and foreholder within the Territory of Utah, and is worth the sum of three hundred dollars, over and above his debts and liabilities, exclusive of property exempt from execution.

JAMES McGREGOR.
W. S. McCORNICK.

Subscribed and sworn to before me this 22nd day of May, 1890.
[SEAL.] JOSIAH BARNETT,
Notary Public.

Filed May 22nd, 1890.

The above transcript is correct.
(Signed) BASKIN & VAN HORNE &
" JOHN M. ZANE,
For Appellant.
" W. H. DICKSON,
" J. G. SUTHERLAND,
For Respondent.

83 In the Supreme Court of the Territory of Utah, June Term, 1890.

At a session of said court held on Thursday, June 12th, A. D. 1890.
Present and presiding: All the justices thereof.

THE WASATCH MINING COMPANY, Respondent,
vs.
CRESCENT MINING COMPANY, Appellant.
} From Third District, Before T. J. Anderson, Judge.

This cause, coming on regularly for hearing, was argued by John M. Zane and R. M. Baskin on behalf of appellant, by W. H. Dickson and John W. Judd in reply, was submitted and taken under advisement.
Anderson, J., not sitting in this hearing; Zane, Ch. J., having been of counsel, not sitting.

84 SATURDAY, *July 12th, A. D.* 1890.

Present and presiding: All the justices thereof.

THE WASATCH MINING COMPANY, Respondent,
vs.
CRESCENT MINING COMPANY, Appellant.

This cause having been heretofore argued and submitted and the court having carefully considered the same and being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the decree of the district court therein be, and the same is hereby, modified in accordance with the views set forth in the

opinion handed down by the court this day, and that respondent pay the costs of this court.

Opinion of the court by Blackburn, J.; Henderson, J., concurring.

TUESDAY, *July 29th, A. D.* 1890.

Present and presiding: The Hon. Henry P. Henderson, A. J.; Hon. Thomas J. Anderson, A. J., and the Hon. John W. Blackburn, A. J.

THE WASATCH MINING COMPANY, Respondent,
vs.
THE CRESCENT MINING COMPANY, Appellant.

85 In this cause it is ordered that the petition heretofore filed, praying for a rehearing of this cause, be, and the same is hereby, denied.

Anderson, J., did not participate in this order. (No opinion.)

86 In the Supreme Court of Utah Territory.

WASATCH MINING COMPANY, Plaintiff and Respondent,
vs.
CRESCENT MINING COMPANY, Defendant and Appellant.

Opinion by Blackburn, Judge.

This suit is brought to foreclose a mortgage made by appellant to respondent. Respondent and Jennings were in litigation about certain mining claims in reference to the ownership thereof, and appellant wished to buy the property in controversy of the respondent, and a bargain was made with it for the sale of the property for a large sum of money, and appellant gave a mortgage to secure the payment of the money and went into possession.

It was stipulated in the mortgage deed that the money was to be paid within one year from the date thereof, but if the litigation for the ownership of the property was not ended within that time the mortgagor was to pay the money into court on a recognized order thereof where the litigation was pending, to be paid at the end of said litigation to the respondent if it should be successful, but if not it was to be returned to appellant.

At the end of the year the litigation was still undetermined, and no order was made by the court for the payment of the money
87 into court nor any steps taken by either the respondent or appellant to have such order made, nor did the appellant offer to pay the money or notify the respondent that it was ready and willing to pay said money into court if such order was made. After the expiration of the year the respondent brought this suit to foreclose the mortgage. The appellant answered the complaint and set up as a defense that it was not in default because the respondent had not procured the order to be made to pay into the court the money, and, further, that the respondent had fraudulently left out of the deed made to appellant of the property sold a part and the

most valuable part of the same, so that the appellant did not get in the deed the property bargained for, and therefore it ought not to pay the mortgage until the full property was conveyed.

Also the record shows that appellant commenced a suit against respondent to compel it to reform said deed and convey to the appellant the territory left out of it. The court below decreed in favor of appellant and that the title to the property left out of the deed be absolutely vested in the appellant. The respondent appealed to this court and the decree was affirmed. Thereupon the respondent appealed to the Supreme Court of the United States, which appeal is still pending, but gave no supersedeas bond. 19 Pac. Rep., 198.

In the case now before this court the district court decreed the foreclosure of the mortgage for the amount thereof and the interest accruing thereon since the same become due and an attorney's fee of one thousand dollars, and that the mortgaged property be
88 sold as in such decree provided, and that out of the proceeds thereon the mortgage debt, with the interest, be paid into court in the case still pending between the respondent and Jennings, and the attorney's fee and cost be paid to the respondents, and from this decree this appeal is taken.

The appellant contends this decree is wrong and ought to be reversed, because:

1st. It was not in default in not paying the money into court, as the mortgage stipulated, for it was not a party to the suit and could not volunteer and procure an order to be made, but it could have, as was its duty to do, gone to the respondent and offered to pay the money into court, and the respondent could and no doubt would have procured the order, and if it did not, then the failure of appellant to pay the money into court would not have put it in default. We do not think the decree should be reversed on this account.

2nd. The appellant contends that the respondent, either by mistake or fraud, failed to convey in the deed made for the mining claims purchased, for the purchase-money for which the mortgage was given, the most valuable of the ground bargained for, and therefore the consideration for the mortgage has failed in part, and that the respondent is not entitled to have its mortgage foreclosed until the title to that ground is conveyed to the appellant, and that this is fully proved by the decree in the case of the appellant against the respondent. This decree is the only evidence in the record of the fraud or mistake claimed in the deed and is competent evi-
89 dence only on the theory that it is *res adjudicata* between the parties. The decree vests this ground in the appellant as against the respondent, and if it is *res adjudicata* as against the respondent, although appealed from, it is also against the appellant, and it has gotten all it contends for and cannot complain.

Again, if this decree *if* confirmed it has the property, and if the appellant finally fails, in that case it is an adjudication that it got in the deed all it bargained for and it must pay off the mortgage.

It also went into the possession of the ground left out of the deed and has profitably worked it ever since, so we cannot see that it has ground of complaint on this account.

3rd. Another contention of the appellant is that the decree allowed interest on the mortgage, because:

1st. The mortgage does not provide for interest, and the money, if it had been deposited into court, as provided for in the mortgage, *it* would not have drawn interest, and the contingency had not yet happened that entitled the respondent to have the money; and, 2nd, the appellant was not in default in not depositing the money, because the respondent did not procure the order required for the deposit of the money. This 2nd reason we have already in this opinion considered. At common law no interest was allowed on debts overdue unless there was an express or implied contract to pay interest.

Madison County *vs.* Bartlett, 1st Scam., 70.

It was the duty of the appellant to pay the money into court according to the provisions of the mortgage, and it was not its
90 concern whether the money would draw interest or not; and, again, it had the use of the money wrongfully and ought not to object to paying interest on it.

This mortgage does not provide for the payment of interest, but it fixes the time when the money is to be paid.

This rule of the common law does not obtain in America and interest is allowed on debts overdue, even if there is no statute providing for interest.

Woods *vs.* Robins, 11 Mass., 504.

And the question has been settled in this Territory in favor of the allowance of interest on debts overdue.

Godbe *vs.* Young, 1 Utah, 55; (same case), 15 Wal., 562.

We think, therefore, interest was properly allowed on the indebtedness from the time it was the duty of the appellant to deposit the money in court.

But we think the decree, under the circumstances of this case, should have allowed the appellant a reasonable time in which to pay the money, say 30 days, before the property was ordered to be advertised for sale.

Also the decree ought to have provided that the money be paid into court in this case instead of the case of the respondent *vs.* Jennings until an order should be obtained in that case for the deposit of the money.

The decree of the court below should be modified in accordance with these views and the respondent should pay the costs of this court.

I concur.

HENDERSON, *Judge.*

91 In the Supreme Court of the Territory of Utah.

WASATCH MINING COMPANY, Respondent,
vs.
CRESCENT MINING COMPANY, Appellant.

Whereas the appellant in the above-entitled action has prayed the allowance of an appeal from the judgment and decision of this court made and rendered on the 12th day of July, A. D. 1890, and the court being willing that said cause should be examined in the Supreme Court of the United States and the error, if any there hath been made, duly corrected, upon motion of Baskin and Van Horne and John M. Zane, attorneys for appellant above named, it is ordered that an appeal herein to the Supreme Court of the United States be, and the same is hereby, allowed, and further ordered that the amount of the supersedeas bond be fixed at the sum of seventy thousand dollars.

Seal Supreme Court. Witness my hand and seal of said court this 5th day of Aug., A. D. 1890.

(Signed) THOMAS J. ANDERSON,
Asso. Justice.

Attest: JOS. P. BACHE,
Clerk Supreme Court, Utah Territory.

Endorsed on back: Title of court and cause. Order allowing appeal and fixing amount of bond. Filed Aug. 5th, 1890. Jos. P. Bache, clerk supreme court, Utah.

92 The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday in October next, pursuant to an appeal to said court from a certain judgment and decision made and entered in the supreme court of Utah Territory, in a certain cause wherein The Wasatch Mining Company is plaintiff and respondent and The Crescent Mining Company is defendant and appellant, to show cause, if any there be, why judgment rendered against the said defendant and appellant should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Hon. Charles S. Zane, chief justice, and the Hon. Thomas J. Anderson, associate justice, of the supreme court of Utah Territory, this 6th day of August, in the year of our Lord one thousand eight hundred and ninety.

Seal Supreme Court Territory of Utah, United States of America.

C. S. ZANE,
Chief Justice of Supreme Court of Utah.
THOS. J. ANDERSON,
Associate Justice of Supreme Court of Utah.

We hereby acknowledge that we have received a copy of the above citation this 6th day of August, A. D. 1890.

W. H. DICKSON AND
SUTHERLAND & JUDD,
Attorneys for Respondent.

[Endorsed:] Supreme court. File No., 99. Citation, original. Wasatch Mining Co. *vs.* Crescent Mining Co. Filed Aug. 6th, 1890. Jos. P. Bache, clerk supreme court, Utah.

93 Know all men by these presents that the Crescent Mining Company, incorporated under the laws of the Territory of Utah, as principal, and Morton L. Sweet, James M. Barnett, Lewis H. Withey, Harvey J. Hollister, Joseph H. Martin, and W. R. Shelby, Charles Fox, E. Crofton Fox, all of Grand Rapids, Kent county, Michigan, as sureties, and James M. Gregor and Thos. Carter, of the county of Salt Lake, Utah Territory, are held and firmly bound unto the Wasatch Mining Company, a corporation, in the full and just sum of seventy thousand dollars, to be paid to the said Wasatch Mining Company, its successors — assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this eighteenth day of August, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a supreme court of Utah Territory, in a suit depending in said court between The Wasatch Mining Company, the obligor herein, therein plaintiff and respondent, and The Crescent Mining Company, therein defendant and appellant, judgment was rendered in favor of said Wasatch Mining Company and against said Crescent Mining Company, and *on* appeal from said judgment to the Supreme Court of the United States was prayed and by order of a justice of the supreme court of Utah Territory allowed, and a citation issued addressed to said Wasatch Mining Company, citing and admonishing it to be and appear before a Supreme Court
94 of the United States to be holden at the city of Washington on the second Monday in October next:

Now, the condition of the above obligation is such that if the said Crescent Mining Company shall prosecute said appeal to effect and if said judgment be affirmed shall pay all of said judgment, to wit, the sum of fifty-one thousand five hundred and seventeen dollars, also including just damages for delay and costs and interest of the appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) CRESCENT MINING COMPANY,
By JOSHUA R. NICHOLS, *Vice president.*
Attest: J. M. GREGOR, *Sec'y pro tem.*

MARTIN L. SWEET. [SEAL.]
JAMES M. BURNETT. [SEAL.]
LEWIS H. WITHEY. [SEAL.]
HARVEY J. HOLLISTER. [SEAL.]
JOSEPH H. MARTIN. [SEAL.]
WILLIAM R. SHELBY. [SEAL.]
CHARLES FOX. [SEAL.]
E. CROFTON FOX. [SEAL.]

Signed, sealed, and delivered in presence of—
(Signed) GEO. M. SCOTT.

Subscribed and sworn to before me this 18th day of August, A. D. 1890.

(Signed) HOYT G. POST,
[SEAL.] *Notary Public, Kent Co. Mich.*

95 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

James McGregor and Thos. Carter, having been first duly sworn, each for himself doth say: I am a resident and freeholder within the Territory of Utah and am worth the sum of twenty thousand dollars over and above my just debts and liabilities, exclusive of property exempt from execution.

(Signed) JAMES McGREGOR.
THOS. CARTER.

Subscribed and sworn to before me this — day of August, A. D. 1890.

(Signed) W. G. VAN HORNE.

Subscribed and sworn to before me this 23rd day of August, A. D. 1890.

(Signed) W. G. VAN HORNE,
[SEAL.] *Notary Public.*

The foregoing appeal bond approved by me this the 25th day of August, A. D. 1890.

(Signed) T. J. ANDERSON, *Judge.*

Endorsed on back: Title of court and cause. Bond on appeal. Approved Aug. 25th, 1890. Filed Aug. 25th, 1890. Jos. P. Bache, clerk supreme court, Utah.

96 In the Supreme Court of the Territory of Utah.

WASATCH MINING COMPANY, Respondent, }
vs.
CRESCENT MINING COMPANY, Appellant. }

TERRITORY OF UTAH, } ss:
Salt Lake County, }

Joshua R. Nichols, being first duly sworn, upon his oath says that he is the vice-president of the said Crescent Mining Company and knows what the value of the property of said company is which by the decree in the above-entitled case was ordered to be sold, and that the cash value of said property is over two hundred thousand dollars.

(Signed) JOSHUA R. NICHOLS.

Subscribed and sworn to before me this the fifth day of August, A. D. 1890.

[SEAL.] (Signed) JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on back: Title of court and cause. Affidavit of value of matter in dispute. Filed Aug. 5th, 1890. Jos. P. Bache, clerk.

97 UNITED STATES OF AMERICA, } *ss:*
Territory of Utah, }

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of an appeal allowed in the case of The Wasatch Mining Company, as respondent, *vs.* The Crescent Mining Company, as appellant, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, bond, affidavit of value, & order allowing appeal, together with the original citation, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record and proceedings, opinion, bond, affidavit, and order is a full, true, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this 2nd day of September, A. D. 1889, at Salt Lake City, Utah.

Seal Supreme Court Territory of Utah, United States of America.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 14,149. Utah Territory supreme court. No. 180. The Crescent Mining Company, appellant, *vs.* The Wasatch Mining Company. Filed September 16, 1890.

Office Supreme Court U. S.
FILED.
OCT 4 1893
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

THE CRESCENT MINING COMPANY, *Appellant,*
vs.
THE WASATCH MINING COMPANY, *Respondent.*
No. 180.

BRIEF OF APPELLANT.

R. N. BASKIN,
Solicitor for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

THE CRESCENT MINING COMPANY,
Appellant,
vs.
THE WASATCH MINING COMPANY,
Respondent.
No. 180.

APPELLANT'S BRIEF.

To prevent confusion, the attention of the court is directed to the fact, that out of the usual course the clerk of the lower court in making up the transcript of the Record inserted the statement upon motion for a new trial and on appeal, before the pleadings. Exhibits "A," "B," "C," "D" and "E" are made part of the statement (See Rec. 1) and approval of Judge Anderson (Rec. 6). The statement therefore includes all in the Record from page 1 to and including Ex. "E," page 30.

This case arose under the following circumstances: Certain mining ground known as the Walker and Walker Extension and Buckeye Mining claims was in litigation between the Wasatch Mining Company and William Jennings (to which the Crescent Company was not a party), both the parties claiming title to the ground. While this suit was in progress the Crescent Mining Company, being desirous of purchasing the groun l, entered into negotiations with the parties to the suit of the Wasatch Mining Company vs. William Jennings. The Crescent Company made a contract with Jennings, March 8, 1883, to purchase the ground, and thereupon entered into possession of the ground. Later on, July 9, 1886, the Crescent Mining Company entered into a contract with the Wasatch Company, the latter company agreeing to

join with Jennings in conveying the land. Afterwards the Wasatch Company made a deed of what was thought to be the whole of the ground bargained for. But owing to a fraudulent conspiracy between the manager of the Crescent Company and certain agents of the Wasatch Company, the most valuable part of the mining ground was left out of the deed. But to secure the purchase price of the mining ground, the Crescent Company, at the time the Wasatch Company made the deed, executed a mortgage to the Wasatch Company on all of its immensely valuable mining ground and plant. Afterwards the Crescent Company discovered the fraud that had been practiced upon it and brought suit to reform the deed given by the Wasatch Company, alleging a conspiracy to defraud between the manager of the Crescent Company and certain agents of the Wasatch Company, and as the result of that fraudulent confederation, the mutual mistake made by both companies in regard to the deed. The Crescent Company won their case in the lower court; it was then appealed to the Supreme Court of the Territory and there affirmed, and an appeal was thereupon taken to the Supreme Court of the United States, where the case was decided in favor of the Crescent Company, at the last term. After the decision of the lower court in the case of the Crescent Company vs. the Wasatch Company, the Wasatch Company brought suit to forclose the mortgage named above.

The mortgage is somewhat peculiar owing to the fact that it could not be ascertained until the suit of the Wasatch Company vs. Jennings was finally determined, who was the owner of the purchased ground. In fact it was on this account that the mortgage was given, because it was impossible to determine to whom the money should be paid. The mortgage recited as follows: "This conveyance is intended as a mortgage to secure payment of $42,500 in one year from date hereof, which sum said first party agrees to pay at the time aforesaid, and said payment shall be made as follows: Absolutely to said party of the second part (the Wasatch Company) if at said time said suit shall have been finally determined in favor of said second party and its title to said Walker and Walker Extension and Buckeye mining claims maintained and established and the same is free from incumbrances made or suffered by the said party of the second part; or if said action (Wasatch Mining Company vs. Jennings) is still pending at the end of a year from date and all the parties thereto direct how such payment shall be made, it shall be made accordingly;

but if the action is then pending and undetermined, and no direction given by all the parties thereto, then and in that case *payment shall be made of said principal into said court in said action recognized by order thereof to be disposed of as follows:*" To be paid to said party if the suit should be finally determined in its favor, but if finally determined adversely to it to be repaid to said first party (the Crescent Mining Company); and it was further provided that "in case default shall be made in the payment of said principal, or any part thereof, then the said party of the second part, its successors or assigns, are hereby authorized to sell the said premises or any part thereof in the manner prescribed by law, and of the money arising from said sale to retain and pay the *said principal together with all costs and charges of making such sale, and a reasonable attorney's fee for foreclosure or collection.*"

See Ex. "A," Rec. 33.

The present suit was brought to foreclose this mortgage. Plaintiff alleged in its complaint that the suit of the Wasatch Company vs. Jennings was still pending and undetermined, that no direction as to payment had been given by the parties to that suit, and that the Crescent Mining Company had not paid the amount into court, and asked for judgment for $42,500 with interest from one year after the date of said mortgage, for $5,000 attorney's fees, and a decree of foreclosure and sale.

See complaint Rec. 31.

The defendant demurred to this complaint on the ground that the plaintiff did not allege that it had obtained an order for the payment of this money into court, or that such order had been made and that defendant had them refused, or that any demand had ever been made upon defendant for payment, and that it appeared on the face of the complaint that defendant, not being a party to the suit of the Wasatch Company vs. Jennings, could not appear in that case, and ask for an order permitting the payment into court.

See demurrer Rec. 31.

This demurrer having been overruled, plaintiff answered and alleged after traversing certain allegations of the complaint, that this mortgage was given to secure the purchase price of certain

mining ground: that owing to a fraudulent conspiracy between the manager and certain agents of the plaintiff, the most valuable part of the lands purchased had by mutual mistake of the two companies been omitted from the deed, and the consideration for the mortgage had failed owing to the said fraudulent confederation and resulting mistake, and then alleged the facts showing that the Crescent Company could not obtain due order to pay this money into court, and that the Wasatch Company had never obtained such an order, and had never made any demand.

See answer Rec. 37.

The cause was tried before the court, and the court gave judgment for $42,500 principal, $7,900 interest, $1,000 attorney's fees and cost of suit, and decreed a foreclosure and sale. Defendant made its motion for new trial, which was denied, and from the final judgment and order denying a new trial it appealed to the Supreme Court of the Territory, and the decree having there been confirmed with certain modifications hereinafter specifically pointed out, an appeal was taken to this court.

ASSIGNMENT OF ERRORS.

Upon the Record and proceedings the appellant assigns and relies upon, in this court, the following errors:

(1.) The court erred in not sustaining the demurrer to the complaint.

(2.) The court erred in allowing the decree of foreclosure.

(3.) The court erred in allowing interest on the principle of the mortgage.

(4.) The court erred in requiring the deposit mentioned in the mortgage, to be made in court in this case instead of the case of the Wasatch Mining Company vs. William Jennings and others as provided in the mortgage.

The foregoing, excepting the fourth assignment, is a statement in an abridged form of the errors urged in the lower courts.

See assignment of error, Rec. 5.

ARGUMENT.

I.

The question presented by the demurrer is as follows:

As the facts regarding the mortgage a foreclosure of which the lower court decreed were fully presented to this court at the last term in the case of the Wasatch Mining Company the court will remember as shown by the statement hereinbefore made in this brief that the mortgagee the Wasatch Company was to become entitled to the amount mentioned in the mortgage only in the event that it should be finally decreed in the case of said Company vs. William Jennings et al. that the Wasatch Company was the owner of the Walker and Walker Extension and Buckeye Mining claims, and that in case, at the expiration of one year from the date of the mortgage the case of the Wasatch Company vs. Jennings should be still pending and undetermined that then payment of the amount of the mortgage, $42,500, should be made into the court in said action recognized by order thereof.

Rec. 34.

The complaint alleged that "the action (the Wasatch Company vs. Jennings) relative to the title mentioned in said mortgage was still pending and undetermined; that no direction had been given by all the parties to said action how payment of said mortgage debt should be made and therefore the condition of said mortgage requiring the mortgagor to pay the mortgage debt into this court (the Third District Court) was operative and such payment was due."

The complaint wholly omitted to allege that any order authorizing or recognizing such payment into said court had ever been asked for or obtained, or that any demand to make such payment was ever made upon the Crescent Mining Company or that it had any notice regarding the same before the institution of the suit of foreclosure.

On account of these omissions it is contended that the complaint fails to state a course of action and on this ground the demurrer is based.

See demurrer, Rec. 36.

The demurrer having been overruled this appellant answered, and in such answer alleges "that it is not a party to said action

against William Jennings et al. mentioned in said complaint, therefore has no right or power to appear in said case and procure the order of the court specified in said mortgage, recognizing, accepting or permitting said deposit to be made, and the plaintiff has not procured any such order or taken any steps in regard thereto or notified the defendant to appear in said court at any time to make such deposit under such order either made or to be applied for."

Rec. 40.

The Supreme Court of the Territory in the statement of the facts of the case, in the opinion, say "at the end of the year the litigation (in the case of the Wasatch Company against Jennings) was still undetermined and no order was made by the court for the payment of the money into court nor any steps taken by either the respondent or appeliant to have such order made." These facts are admitted by the respondent.

See Rec. 3.

Therefore the same question raised by the demurrer is presented by the subsequent proceedings on the face of the Record and is covered by the second assignment of error and can be discussed under one head.

The statute permits the payment of money into court only under certain circumstances by a party under the order of the court and this case does not come under the statute.

2 Compiled Laws, 1888; 276, sec 3336.

Under the rules of chancery practice a party to an action may obtain an order for the payment of money into court.

2 Daniels' Chancery Practice, 1786. Perkins Ed., vol. 3, p. 1828.
Anonymous, 1 Vesey Jr., 56.
1 Wait's Practice, 584.
2 Wait's Practice 268, 596.
Johnson vs. Chippendail, 2 Simons, 55.

But this order cannot be asked for by one who is not a party to the suit.

2 Wait's Practice, *supra.*
5 Maddox, 75.

It will be seen from reading the mortgage given that it was expressly stipulated that the money should be paid into court in

the action but recognized by order of the court to be disposed of as stipulated. The payment was first to be recognized, *i.e.*, permitted by order of the court, and the making of this order was a necessary act to be done before the money could be paid into court. The Crescent Company could not be in default until this order was made and the payment into court recognized and permitted. If the order made by the court permitting the payment should name conditions not fixed by the mortgage, the Crescent Company could refuse to pay into court. Certainly it were not in default until the order was made. But here the Wasatch Company, without asking for any order, without giving the Crescent Company any opportunity to make payment, lies by and suddenly demands foreclosure. Suppose that the Crescent Company had gone into court and handed this money to the clerk. He could have refused to receive it, but even had the clerk waived the point and taken the money, he would have been responsible for it in no official capacity. Such payment to the clerk would not have been a payment into court. Until such order was obtained it was impossible for the Crescent Company to make the deposit in court. Such an order was of the greatest importance to said company in this respect. If the deposit were made under the order of court recognizing it, and the money should be squandered or destroyed the loss would not fall upon the Crescent Company.

If deposited with the clerk without an order of court and the money should by him be embezzled, the loss would fall upon the Crescent Company because the mortgage does not authorize the deposit to be made without such order.

Until such order was obtained the Crescent Company was not in default and the Wasatch Company could have no cause of action.

Here it is acknowledged that the Wasatch Company asked for no order, got no order. One is at a loss to see with what show of fair dealing the Wasatch Company can come into a court of equity and ask for a foreclosure under such circumstances.

II.

Until the Crescent Company received the deed it was entitled to or until the final confirmation of the decree, in the case of the Crescent Co. vs. the Wasatch Company, reforming the deed it actually got, the mortgage could not be rightfully foreclosed.

I am aware of the rule that a purchaser in possession cannot

defend a suit to foreclose the purchase money mortgage, on the ground of defect of title or want of title that existed at the time of the execution of the mortgage.

Peters vs. Bowman, 98 U. S. 56.
Noonan vs. Lee, 2 Black 500.
Patton vs. Taylor, 7 Howard 133.
McConihe vs. Fales, Ct. Appeals N. Y. 14 N. E. Reports 285.

But all the foregoing authorities make the distinction that this rule applies where no *fraud, accident or mistake* is pleaded. And the reason of the rule is plain. If there was no fraud, no accident or mistake, the purchaser acted with his eyes open, and knew all the facts. He has gotten the possession, and it is his own fault if that possession is not properly buttressed by the covenants in his deed. He presents no ground for equitable relief, and the rule above stated is, therefore, an exception to the general rule that want of consideration cannot be plead in such cases as a defense.

But even to this rule some courts admit the exception that the mortgagor, by way of defence, may offset the damages he has sustained, whether the failure of title be complete or partial.

Coy vs. Downie, 14 Fla. 544.
Lowry vs. Hurd, 7 Minn. 356.
Walker vs. Wilson, 13 Wis. 522.
Hall vs. Gale, 14 Id. 54.
Mendenhall vs. Steckel, 47 Md. 453.
Scantlin vs. Allison, 12 Kan. 85.
Chambers vs. Cox, 23 Id. 393.
Kelley vs. Kershaw (Utah), 14 Pac. Rep. 804.

Or where the vendor is insolvent or unable to pay damages.

McLemore vs. Mabson, 20 Ala. 137.
Knapp vs. Lee, 3 Pick. 452.

But all the above authorities are united in holding that where the mortgage is obtained by the vendor's (mortgagee's) fraud, a clear case for equitable relief is presented. So, too, if the mortgage was obtained through the mutual mistake of the parties. For if the vendor insists in taking advantage of the mutual

mistake and the advantage that it gives him, so as to get the money that was to be paid, and at the same time defeat the other party's getting what he paid for, he converts his mistake into a fraud and his conduct immediately becomes grossly dishonest. And when such a man comes into a court of equity and good conscience asking for relief, he is told that he who comes into equity must come with clean hands. The settled doctrine is that where fraud or mistake is pleaded and proven, as causing the lack or failure of consideration for the mortgage, the suit to foreclose is successfully defended.

Authorities cited *supra*, and,
Booth vs. Ryan, 31 Wis. 45.
Robards vs. Cooper, 16 Ark. 288.
Furman vs. Meeker, 24 N. J. Eq.
Allen vs. Shackleton, 15 Ohio St. 145.
Dayton vs. Melick, 32 N. J. Eq., 570; 27 Id. 362.
Bank vs. Pinner, 10 C. E. Green 945.
Drayton vs. Dusenberry, 10 Id. 110.
Van Riper vs. Williams, 2 N. J. Eq. 407.
Stiger vs. Bacon, 2 Stewart 443.
Natchez vs. Minor, 9 Sm. and M. 544.

See also as bearing upon the question:

Van Waggoner vs. McEwen, 1 Green Ch. 412.
Jacques vs. Esler, 3 Id. 533.
Stehley vs. Irwin, 8 Barr 500.
Conklin vs. Bowman, 7 Ind. 533.
Conwell vs. Clifford, 45 Id. 392.
Nelson vs. McPike, 24 Id. 60.
Philbrooks vs. McEwen, 29 Id. 347.
Church vs. Fisher, 40 Id. 145.
Pointnell vs. Spenser, 6 Barr 254.
Pac. Iron Works vs. Newhall, 34 Conn. 77.
Akerly vs. Vilas, 21 Wis. 88.
Wearse vs. Pierce, 24 Pick. 141.
Hannen vs. Hannen, 123 Mass. 441.
2 Jones on Mortgages, § 1,500 *et seq.*

It will be remembered that in this case the purchaser got little if anything by his deed, and that this was caused by the fraud

practiced upon him by the defendant's agents. This was pleaded and fully proven.

> See Wasatch Company vs. Crescent Company, decided at last term of this court.

Then the respondent took the position in the lower court that by the decree in the case of Crescent vs. Wasatch, we had gotten the ground and hence there was no failure of consideration. To this evasion the answer is plain. We are not compelled to take the decree instead of the deed for the land itself, because the decree was liable to be reversed on appeal.

The ground upon which the appellant in the case of the Wasatch Company vs. The Crescent Company asked this court to reverse the decree was that the findings of fact were not responsive to the issue. If the decree in that action had been reversed the case would have been set back by this court as a matter of course for a new trial. The Crescent Company bargained for and was entitled to a deed from the Wasatch Company, which, in case the latter should succeed in the case of the Wasatch Company vs. Jennings, would pass to the Crescent Company a perfect title to the property which it bought. It received no such deed and had no legal title from the Wasatch Company to the most valuable portion of the property contracted for, until the final affirmation of the decree in the case of the Wasatch Company vs. The Crescent Company. Until the confirmation of this decree and not until then had the Wasatch Company any right to foreclose the mortgage.

Nor was the Crescent Company under any obligation, either legally or morally, to pay the money into court, even had there been obtained an order allowing the same to be done; because during the five years which litigation lasted, under the imperfect deed which the Wasatch Company wrongfully refused to correct, the title of the Crescent Company to the Walker and Walker Extension and Buckeye claims was by this wrong clouded and imperfect. The property could not be sold for anything near its value and the stock of the company was depreciated. Had it not been for this wrong, the title of Jennings having been acquired, no cloud would have existed whichever way the case of the Wasatch vs. Jennings might terminate. This wrong, therefore, worked a serious injury which in equity should debar a foreclosure of the mortgage as long as it was persisted.

This suit to foreclose the mortgage may be likened unto a suit for the specific performance of a contract, because the mortgage here is not so much a mortgage as it is a contract to give further assurance or security. It certainly would be a defence in any court of equity to a suit for specific performance that the contract was obtained by fraud or mutual mistake. How then can the plaintiff be in any better situation here? We contracted to deposit a certain sum of money (if it be true that the demurrer was properly overruled) in consideration of the Wasatch Company making a deed to us of certain mining ground, but the Wasatch Company having by the action of their agents, given us a deed leaving out the best part of the ground, still comes now and trying to make its agents' fraud its own fraud and converting its former possibly innocent mistake into a fraud of the grossest character, insists that we deposit the money. It seeks plainly to get something for what we were defrauded of.

III.

Even if the court should affirm that part of the decree which requires this money to be paid into court, the allowance of interest to the plaintiff is so palpably erroneous that the decree should be reversed.

The mortgage in its terms conclusively shows that the payment of interest was not intended by the parties. No interest is mentioned in the body of the mortgage, provision, however, is made for the disposition of the proceeds, in case of sale of the mortgaged premises in the following language: "And in case default shall be made in the payment of said principal, forty-two thousand five hundred ($42,500) dollars or any part thereof, then the said party of the second part its successors or assigns are hereby authorized to sell the said premises or any part thereof, in the manner prescribed by law, and out of the moneys arising from such sale to retain and pay the *said principal, together with all costs and charges of making such sale, and a reasonable attorney's fee for foreclosure or collection and the overplus, if any there be, shall be paid by the party making such sale on demand, to the said party of the first part.*" Rec. 34. This language disposes of the whole proceeds of the sale in such a manner as to exclude all possibility of interest.

The Supreme Court in its opinion, says: "The question has been settled in this Territory in favor of the allowance of interest on debts over due," and cites the case of Godbe vs. Young, 15 Wall. 562.

The want of analogy between that case and the one at bar is manifest when it is considered that under the provisions of the mortgage the payment of the money into court would merely have been the substitution of a moneyed security in place of the security furnished by the mortgage, and that no indebtedness under the arrangement existed or could possibly exist or become over due until the final termination of the case of the Wasatch Company vs. Jennings, in favor of said Company and that when that event should happen the only amount which, under the terms of the mortgage, could possibly become due and owing to the Wasatch Company was the amount of the purchase money; after such an event if the money was not forth coming interest would be allowable. Until the happening of that event the Wasatch Company had no interest in the money whatever except as a security for the payment of the purchase money, in case it should in the future become entitled to the same.

Interest is either the creature of a statute or it is the result of a contract in express terms, or a contract that the law implies.

Mason vs. Callender, 2 Minn. 350, 72 Am. Dec. 102.

(1.) No statute authorizes the granting of interest in such case as this.

(2.) The mortgage here sued on was absolutely and completely silent as to interest. The money was not to be paid until a year after the mortgage was executed, and during that year was not to draw interest, because nobody was entitled to the money.

(3.) No contract to pay interest can be implied here, because such an implication arises only where there is a debt due to somebody, who has the right to use the money, and who is injured to the amount of the interest because he was not paid the money.

Selleck vs. French, 1 Conn. 32; 6 Am. Dec. 185 and note.

Interest in such case is given as damages for payment having been delayed. But suppose this $42,500 had been paid into court. It would be lying there yet. Nobody had the right to use the

money. It would simply be lying there now untouched as it will continue to lie there until it is determined who owns this mining ground. No one could have obtained interest, and no one has been injured by the loss of interest. It is proven by the fact that no interest was provided for in the mortgage itself. The sum secured was not to draw interest before the day fixed for depositing. What reason can there be in its drawing interest after that day, but before depositing, when the owner is still undetermined and there is no person ascertained to whom a debt is due, and no person who can possibly be damaged by the delay.

Suppose this were a case where the Crescent Company had bound itself in the sum of $42,500 to deposit that amount in court under the circumstances stated in the mortgage. Here if they sued upon the bond their recovery would be limited to the amount of the penalty; or if they sued upon the covenant they must show damages in loss of interest from a breach of the covenant. But in this case they could not show damages by loss of interest, because they were not entitled to the use of the money, and were not injured by the failure to deposit it. Their recovery must be limited to $42,500 with costs.

Fraser vs. Little, 13 Mich. 195; 87 Am. Dec. 741, note.
Graham vs. Bickham, 2 Yeates 32; 1 Am. Dec. 328, note.
See Foster vs. Weston, 6 Bing. 709.

The mortgage sued upon was simply a covenant for further assurance, providing for no interest either before or after the time to deposit the money. Interest can be awarded only upon the supposition that some one has been injured by the failure to deposit the further security. But no one was entitled to the use of the money, and, therefore, no one has lost interest.

See Curtis vs. Innerarity, 6 How. 146.

IV.

The mortgage provides that the money under certain contingencies should be paid into the Third District Court, in an action therein pending between the Wasatch Company and William Jennings.

The Supreme Court of the Territory modified the decree of the District Court, requiring the Marshal, out of the proceeds of

the sale of foreclosure, after paying the costs and an attorney fee of one thousand dollars, to pay the balance, or so much thereof as may be necessary to make said principal sum of forty-two thousand five hundred ($42,500) dollars, with interest thereon amounting to seven thousand nine hundred and sixty-seven ($7,967) dollars, into the Third District Court in said action wherein the Wasatch Company is plaintiff and William Jennings, et al., are defendants (see Rec. 45), so as to require the money to be paid into the Supreme Court of the Territory in this case until an order should be obtained in the case of the Wasatch Company vs. Jennings in the Third District Court.

See opinion and judgment making this modification, Rec. 49 and 52.

This action of the court is erroneous for two reasons:

First. Because it permits a disposition of the proceeds of the sale different from that agreed upon by the parties to the mortgage, in this: The disposition of the proceeds in case of sale agreed upon by the parties was: first, the principal of the mortgage ($42,500) should be retained together with costs and attorney's fees; and, second, the overplus, if any, was to be paid to the mortgagee.

The decree thus modified directed interest amounting to $7,967 of the surplus to be retained, thus violating the agreement of the parties.

Second. Because the modification violated the agreement of the parties. In this it was stipulated that the deposit should be made in the Third District Court in the case of the Wasatch Company vs. Jennings.

Courts can enforce the contracts of parties, but never change or modify them.

Again the fact that the deposit was ordered to be made in this case in the Supreme Court of the Territory until an order could be obtained in the case and in the court agreed upon by the parties, is an acknowledgment of the necessity for such an order before the deposit could be made, and until made the Crescent could not be in default, and that the Wasatch Company had no cause of action when this suit was commenced and could not have until by such order it became possible for the Crescent Company to make the deposit according to the terms and conditions of the mortgage. In other words, it was the duty of the Wasatch Company to pro-

cure an order permitting the deposit subject to the terms and conditions stipulated in the mortgage and notify the Crescent Company of the existence of such an order, before the Crescent Company could be put in default or the Wasatch Company could have any right to foreclosure.

Respectfully submitted,

R. N. BASKIN,
Solicitor for Appellant.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 180.

THE CRESCENT MINING COMPANY, APPELLANT,

vs.

THE WASATCH MINING COMPANY, RESPONDENT.

RESPONDENT'S BRIEF.

J. G. SUTHERLAND,
Solictor for Respondent.

Star Print. Herald Block.

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RESPONDENT'S BRIEF.

The following is a statement of the facts essential to be considered in the determination of this case:

In July, 1886, there was an action pending in the Third District Court of Utah, wherein the plaintiff herein was plaintiff and Wm. Jennings and others were defendants, in which was involved the question of the title to certain mining ground. The defendant herein being desirous of purchasing such mining ground, no matter which of the parties litigant should be adjudged to be the owner thereof, and having secured from the said William Jennings and others an agreement by which they were to convey to the defendant herein said premises in the event that they should ultimately prevail in said action, did on, to-wit: the day of September, 1886, take from the plaintiff herein a deed supposed by the parties thereto to embrace the premises which the defendant herein was bargaining for. The consideration for this deed was to be $42,500 in the event that the plaintiff, the Wasatch Mining Company, should be finally adjudged, in said action, to be the owner of said premises And to secure the payment of

said sum the Crescent Mining Company on the date last aforesaid, executed and delivered to plaintiff the mortgage in question in this suit. It is recited therein that it is given to secure the payment of $42,500 in one year from its date, and therein the defendant, the Crescent Mining Company, covenanted to pay the same at the expiration of said year, as follows: Absolutely to said Wasatch Mining Company, its successors or assigns, if at said time the said suit between the plaintiff herein and the said William Jennings and others should have been finally determined in favor of the Wasatch Mining Company and its title to the premises maintained and established; or if said action was then still pending and all the parties thereto should direct how such payment should be made the same should be made accordingly; but if said action was then still pending and undetermined, and no direction should be given by all the parties thereto, as to the manner of payment of said sum of $42,500, then and in that case payment should be made of said principal into said court in said action, recognized by order thereof, to be disposed of as follows: To be paid to said Wasatch Mining Company, its successors or assigns, on the final determination of said action in its favor and confirmation of its title to said premises, and subject to be repaid to said Crescent Mining Company on its request, or on its order, if said action should be finally, and on its merits, determined adversely to said Wasatch Mining Company on its claim of title to said premises. There was also contained in said mortgage a power of sale should default be made in the payment of said principal sum or any part thereof.

See copy of mortgage, Record pages 24-26.

Thus it will be seen that payment was to be made, in any event, at the expiration of one year from the date of the mortgage, that is, in no event was the defendant, the mortgagor, to be permitted to longer retain in its hands the agreed purchase money. This manifestly was a very essential condition for the proper security and protection of the Wasatch Mining Company, whether it was or was not entitled at the end of such year to have and receive said money into its own hands; for the defendant having been let into possession of and entitled to work the premises conveyed and mine and extract the ores therefrom (see

3d Finding of Fact, Record page 41), the whole substance of the estate upon which the mortgage security was given might be exhausted before said suit should be finally determined. The parties to the mortgage, foreseeing this, guarded against any such loss of security by stipulating that in no event should the purchase price be withheld for a longer period than one year.

It stands admitted by the pleadings that at the time this suit was commenced—more than a year after the date of the mortgage—the said action against William Jennings and others was still pending and undetermined and that the parties thereto had not given any direction as to the manner of the payment of said sum of $42,500, and that no part of the same had been paid.

See 5th Finding of Fact, Record page 41.

In January, 1887, a dispute having arisen between the parties hereto as to whether said deed given by the plaintiff to the defendant included all of the premises intended by the parties thereto to be embraced therein, the Crescent Mining Company commenced an action in the Third District Court of Utah against the Wasatch Mining Company to obtain a reformation of said deed, alleging in its complaint that a large and valuable portion of the premises intended to be conveyed had been omitted from said deed through the fraud and collusion of certain of the officers and agents of the respective companies. Afterwards such proceedings were had in said action, that on the 30th day of June, 1887, said District Court made its decree therein, in favor of the plaintiff therein, the Crescent Mining Company.

By its findings of fact in said action it was determined that a portion of the premises—being the same as that secondly described in the answer herein—had been omitted from said deed through a mutual mistake of the parties thereto.

See Record, page 28-30.

The decree in said action directed the defendant therein, plaintiff herein, to execute and deliver to the Crescent Mining Company, a deed for the premises so found to be omitted from the deed theretofore given. It was further adjudged and decreed by the court in said action: "*That until and in default of such conveyance all the right, title and interest of said defendant* (plaintiff

herein) *in or to the property last aforesaid* (being the premises so found to be omitted) *held on the 3d day of January, 1887, or since acquired by defendant be and hereby is vested in and adjudged to be owned and possessed by said plaintiff and that the title thereto is hereby confirmed and quieted in said plaintiff.*"

See Decree, Record page 30.

In due time the defendant, the Wasatch Mining Company, appealed to the Supreme court of Utah, and there the decree of the court below was in all respects affirmed on the 27th day of August, 1888.

See 8th finding of fact, record p. 42.

A petition for a rehearing having been filed the same was denied on the 7th day of January, 1889.

Record p. 42, 9th finding.

An appeal to the Supreme Court of the United States was thereupon prayed and allowed, and such appeal was pending when the decree herein was entered.

Record p. 42, 9th finding of fact.

The record shows that no supersedeas bond was given on the last mentioned appeal; (See opinion Supreme Court of Utah, record p. 51.) Ever since the execution of the deed and mortgage of September 1st, 1886, the defendant herein has been in the possession of all said premises, including that portion claimed by it to have been omitted from said deed, and is still in possession, and during all said period was and is still engaged in mining, extracting and converting to its own use the ores therein contained.

See 3d finding, record p. 41.

Prior to the trial herein defendant had so mined and converted to its own use ores of the value of more than $100,000.

See testimony of Stuart Stevenson, a witness for defendant, record page 3.

Upon this record defendant contends that plaintiff is entitled no relief whatever—that its bill should have been dismissed—and this upon either one of two distinct grounds:

First.—It is contended that according to the true intent and meaning of the mortgage it was incumbent upon the plaintiff to

procure the order of court (referred to in the mortgage) in the suit against the said William Jennings and others, subject to which the mortgage money was to be paid into court, and to give the defendant notice thereof. That until these steps had been taken the defendant was not in default, in failing to pay, or offering to pay, said money into court as it had covenanted to do.

It will be remembered here that defendant's covenant was that if at the end of a year from the date of the mortgage the suit against the said William Jennings and others was still pending and all the parties thereto had not directed how the mortgage money should be paid, then the defendant would pay the same into court in said action, recognized by an order, etc. This contingency had happened prior to the commencement of this suit, and no part of the money had been so paid. Defendant's covenant had not been kept, for it will hardly be denied that a promise is broken unless its stipulations are fulfilled. To excuse the non-performance it is surely incumbent on the defendant to show that it has done all in its power to perform, and that it was prevented from complying with its covenant by the act of the plaintiff.

It cannot be necessary to cite authority to sustain the proposition that it is the duty of the debtor to seek his creditor, if he be within the State, and pay, or tender payment of the debt, when it has become payable. No demand is necessary on the part of the creditor, unless made so by the terms of the contract.

If one contract to deliver to another specific articles of a ponderous or cumbrous character, and no place is appointed by the contract where such delivery is to be made, it is incumbent upon the person charged with the duty of such delivery, if desirous of performing his contract, to seek the person entitled to delivery and request him to designate a place therefor.

Bixby vs. Whitney, 5 Greenleaf, 192.
Bean vs. Simpson, 16 Me., 49.
Howard vs. Miner, 20 Me., 325.
Lush vs. Druce, 4 Wend., 313.

The defendant was bound to take notice, without any demand from plaintiff that the contingency had arisen, upon which

this money under the covenant contained in the mortgage was payable into court.

2 Parsons on Contracts, p. 669, note e.

See cases collated, 1 Am. Ld. Cases, pp. 57-8-9.

But it is insisted by defendant that it had no right and no power, being a stranger to the action of the Wasatch Mining Company vs. William Jennings and others, to procure the order to be made therein, referred to by the mortgage, and therefore it was under no obligation to act until the plaintiff had obtained such order. The answer is plain: The plaintiff was equally powerless to procure the order. The court would never, on the application of the plaintiff alone, have made an order in that action requiring the defendant, who was a stranger thereto, to pay money into court or to do any other thing. This is shown by the very cases relied on by defendant. No court will be guilty of the folly of making orders in causes pending before it, which it is wholly powerless to enforce.

Who, then, was required to take the initiative? The defendant clearly. The covenant to be performed was its covenant. The time for performance had arrived. If it desired to perform it, it was its duty to seek the plaintiff, to whom performance was due, and make known its readiness and willingness to comply with its contract, and to request plaintiff to go into court with defendant and procure the necessary order. By thus in open court offering to submit to and comply with the order, all difficulty would have been removed. Had defendant done this, it would simply have done what was in its power to do to comply with its covenants. This it was its duty to do.

Second.—It is contended by defendant that it cannot be required to pay this money into court until it has procured the deed called for by the decree in the case of the Crescent Company vs. the Wasatch Company. And counsel cites a multitude of cases in this connection which we need not stop to consider since they are clearly distinguishable from the case before the court.

What are the facts as disclosed by the record? Defendant has had the exclusive possession of all the premises not only that included within the deed but also that portion which it is

contended was improperly omitted therefrom, ever since the date of the deed and mortgage. During all that period defendant has been mining, extracting and converting to its own use the ores therein, and prior to the trial herein had already so converted to its own use more than $100,000 worth of ore taken from these premises, the agreed purchase price to secure which the mortgage in the suit was given being but $42,500. In addition to this defendant was by virtue of the decree in the suit of the Crescent Mining Company vs. the Wasatch Company clothed with the absolute legal title to all the premises it claimed to be entitled to as well that portion omitted as that embraced within the deed of September, 1886.

See Record pp. 29-30.

Bryant vs. Kennett, 113 U. S. 179, 186-7, 198.

It was contended that this decree was binding and conclusive between the parties. Let it be conceded. If conclusive for one purpose it was so for all. Therefore defendant has now and did have before this suit was instituted the legal title to all it pretended to be entitled to and has now and had then the exclusive and peaceable possession of all the premises. What more is it entitled to? Will the defendant be permitted to retain the possession and the legal title to all the premises it claims to have purchased from us, and to go on working the mines and exhausting the substance of the estate, and also to withhold the purchase price thereof and to refuse to pay the same into court as it stipulated? At the time this suit was commenced it was inevitable that a number of years must elapse before the case of the Crescent Company vs. the Wasatch Company could be finally determined in the Supreme Court of the United States; if in the meantime the defendant were permitted to withhold the mortgage money and to go on working the mines our security would in all probability have been entirely dissipated, and the defendant would have secured the premises for nothing. That is precisely what it is endeavoring to accomplish.

But it was said: "If defendant is compelled to pay this money now, and the decree in the Crescent Company vs. the Wasatch Company should be reversed, the defendant will have been compelled to pay for something it bargained for but never

got." Not so. In the first place it will be remembered that we were not seeking to have this money paid over to us, but merely to have it paid into court, so that we may not be defrauded of our security. In the next place had that decree been reversed and the case finally determined against the Crescent Company, it could only have been upon the ground that there never was any fraud or mistake in drawing the original deed, but that that deed embraced all that defendant bargained for or was entitled to receive. If so, defendant would have no ground to complain if it were required to pay this money into court now, and ultimately to pay it over to plaintiff, for that would be only what was required of it by the contract.

But if defendant wants the deed called for by the decree in that case, the record shows that all it has to do is to step into the Clerk's office and get it. It lies there properly executed and subject to defendant's call. No supersedeas bond was given on the appeal to the United States Supreme Court.

See 7th Finding of Fact, Record page 42,
See 2 Compiled Laws of Utah, 1888, p. 365, Sec. 3640.
[redacted].

The plaintiff always maintained that there was neither fraud nor mistake in framing the original deed. That it included everything the parties intended it should. The Supreme Court of Utah decided against us on that question. But surely we had the right to have that decision reviewed in the court of last resort. What the defendant insisted on in the court below was that we formally and voluntarily delivered the deed called for by the decree, upon condition that defendant pay the $42,500 into court. In other words that we compromise our right to be heard in the Supreme Court of the United States. The lower court was urged to deny us, in effect, the right to appeal from its decision in a case where an appeal is given by law, or to subject us to the penalty of losing the security stipulated for in the mortgage.

As to the question of interest: We cite

Van Rensselear vs. Jewett, 2 N. Y., 135.
Adams vs. Fort Plain Bank, 36 N. Y., 135.
People vs. N. Y., 5 Cow., 331, 334-5.
Reed vs. Rensselear Glass F., 3 Cow., 393 425.
Curtis vs. University, 6 How., 146.

Had the money been paid into court when payment there became due it does not necesarily follow that it must have lain idle. It might have been and doubtless would have been invested so as to be productive. And the increase so earned would have belonged to plaintiff if it ultimately became entitled to the principal.

Defendant has unlawfully detained this large sum for many years now. It had the use of it all that time without right. It should make compensation therefor. To hold otherwise is to encourage others similarly situated to violate rather than to keep their engagements.

The counsel fee given is just what was admitted by the answer to be reasonable.

See Answer, Record page 39.

The 3d and 4th errors assigned, would, if well taken, require a modification only of the decree.

Respectfully submitted,

J. G. SUTHERLAND,

Solicitor for Respondent.